A

TREATISE

UPON THE

LAW

OF

LEGACIES.

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LONDON:

PRINTED FOR J. BUTTERWORTH, FLEET STREET,

BY C. WOODFALL, NO. 22, PATERNOSTER-ROW.

1799.

ADVERTISEMENT.

IT has been the Author's Endeavour in the following Pages to collect moſt of the Caſes determined upon perſonal Bequeſts, and to extract from them Principles (ſo far as the Subject from its Nature is capable of being reduced to Principles, or poſitive Rules) which may be applied to Queſtions, in ſimilar Circumſtances. In order to avoid Prolixity, References are only given to the Caſes, except in a few Inſtances, where a Statement of the Subſtance or material Parts of them appeared neceſſary to illuſtrate the Reaſons upon which they were determined.

The principal Part of this Treatiſe is compiled from Notes collected during the Author's Courſe of Reading as a Student; he has been induced to add to, methodize, and publiſh them, under the Idea, that as no Book within his Recollection has fully and ſingly treated upon the Subject, the preſent Undertaking might not be altogether unſerviceable to the Profeſſion.

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DIFFERENT KINDS OF LEGACIES.

PROPER Legacies may be claſſed under two Heads, *viz. pecuniary* and *ſpecific.* The *firſt* may be defined to be "The Gift of a particular Thing by Teſtament, in which an Executor is named; or by a Writing in the Nature of a Teſtament called a Codicil, in which no Executor is named." The *latter* "The Bequeſt of a particular Thing, ſpecified and diſtinguiſhed from all other Things of the ſame Kind, as of a Houſe, a Piece of Plate, or a Term for Years.

There is an *improper* Kind of Legacy termed a Donation *Mortis Causâ*, of which I ſhall treat in this chapter. Swinburne, in his Treatiſe upon the civil Law, divides it into three Kinds, *viz.*

FIRST, Where a Perſon *not terrified* by the Apprehenſion of any *preſent Peril*, but moved by the *general Conſideration of Man's Mortality*, makes a Gift.

SECOND, Where a Perſon moved by imminent Danger, gives in ſuch a Manner, that the Subject is *immediately* made his to whom it is given.

THIRDLY, Where a Perſon being *in Peril of Death*, gives ſomething, but *not* ſo that it ſhould *preſently be his* who received it, but *in Caſe only the Giver die.*

This laſt Species of Donation is the only proper Donation *Mortis Causâ*, as is generally underſtood by the Term; the former being nothing elſe than pure irrevocable Gifts *inter vivos.* That the laſt Species of Donations mentioned by Swinburne is the only proper Donation *Mortis Causâ*, is apparent alſo from the Definition given of it in Juſt. Inſt. Tit. 7, *De Donationibus*, after the Conteſt which prevailed on the Subject ſubſided.

This Kind of amphibious Gift ſo far participates of the Nature or Quality of a Legacy, that it is *ambulatory* and *imperfect* during the Donor's Life, and conſequently *revocable;* and, upon a Deficiency of Aſſets, it is liable to Debts *(a)*. But in the following Particulars a Donation *Mortis Causâ* differs from a Legacy, *viz.* It is not within the Juriſdiction of the

(a) 1 P. Will. 406.

Eccle-

Eccleſiaſtical Court; and is not to be poſſeſſed by the Executor; it does not *regularly* fall within an Adminiſtration, nor requires any Act by or from the Executor to conſtitute a Title in the Donee.

In Order to give Effect to theſe Donations, there muſt be an *actual Delivery* of the Thing intended to be given, or, at leaſt, the *beſt Delivery* it is capable of: for where the Thing delivered in Lieu of the Principal, or Thing intended to be given, in Caſes where the Principal itſelf cannot be given, is mere evidence of the Principal's Exiſtence, and *no Property* is transferred to the Donee by ſuch Delivery, or, at the furtheſt, *a Right of Action only*, ſuch a Delivery, with a View to a Donation *Mortis Causâ*, *cannot* be ſupported.

Upon this Principle Lord Hardwicke decided, in the Caſe of *(b)* Ward *v.* Turner, that *Delivery of Receipts for South Sea Annuities* was not ſuch a Delivery of the Annuities themſelves as they were capable of, and therefore that the Gift of them as an intended Donation *Mortis Causâ*, could not be ſupported. But he inclined to think, that if a Tranſfer of the Annuities had been

(b) 2 Veſ. 431.

made to the Donee, the Gift would have been complete to operate as a Donation *Mortis Causâ*. Alſo in the Caſe of *(c)* Miller *v.* Miller, Delivery of a Note for 100l. to the Teſtator's Wife, the Note *not being a Caſh-Note* not *payable to Bearer*, was adjudged to be inſufficient to paſs to the Donee the Money ſecured by it as a Donation *Mortis Causâ*.

Bank-Notes being conſidered as Caſh, and *Bonds*, from their particular Nature as Securities, have been adjudged capable of ſuch a Delivery as is ſufficient to conſtitute a valid Donation *Mortis Causâ*. The *former* were adjudged ſo in the Caſes of Miller *v.* Miller, and *(d)* Hill *v.* Chapman; the *latter* in the Caſe of *(e)* Snellgrove *v.* Baily, which was afterwards acknowledged by Lord Hardwicke to be a proper Determination in the Caſe of Ward *v.* Turner *(f)*.

For the ſame Reaſon that Bank-Notes are conſidered as Subjects proper for Donations *Mortis Causâ*, it ſeems that *Government Securities for Money* will alſo be conſidered as ſuch. Upon this Principle the Opinion of the Maſter of the Rolls, in the Caſe of *(g)* Jones *v.* Selby, may be ſupported, although Lord Cowper, on Appeal,

(c) 3 P. Will. 356. *(d)* 2 Brown Ch. Ca. 612. *(e)* 3 Atk. 214. *(f)* 2 Veſ. 431. *(g)* Pre. Ch. 300.

avoided

avoided determining upon the Validity of the Donation; he being of Opinion, that if it could be ſupported, the Gift was ſatisfied by the ſubſequent Act of the Teſtator.

It may be inferred from Lord Hardwicke's Reaſoning, in the Caſe of Ward *v.* Turner, that when the intended Gift, from its Size or Quantity, is incapable of Delivery in Specie, Delivery of the Thing by which Poſſeſſion is to be obtained, and the Thing uſed, will be conſidered as ſuch a Delivery of the Subject itſelf as, with the other Requiſites, will conſtitute a complete Donation *Mortis Causâ*. But in all Caſes of Donations *Mortis Causâ*, the Delivery of the intended Gift muſt have *a View to the Death of the Donor*, or elſe it cannot be ſupported. According to this Diſtinction it was determined, in the Caſe of *(h)* Tate *v.* Hilbert, that neither the Gifts of the Check or Note were valid as Donations *Mortis Causâ*.

Notwithſtanding the Neceſſity of Delivery, or ſymbolical Delivery, to perfect a Donation *Mortis Causâ*, when there is no other Evidence of the Gift, it ſeems to be unſettled in our Law, whether Proof of ſuch a Gift appearing in *Writing*, as *by Deed*, without Delivery of the Articles

(h) 2 Veſ. Jun. 111.

intended to be given, is ſufficient to effectuate a complete Donation *Mortis Causâ*. By the *Imperial* Law it was ſufficient *(i)*, and by our own the better Opinion appears to incline in Favour of the Gift. See the Caſes of *(k)* Tate *v.* Hilbert, and *(l)* Johnſon *v.* Smith. If, therefore, ſuch Opinion be correct, it may be inferred that the Whole of a Perſon's Chattels may be the Subject of a Donation *Mortis Causâ*, which could not be the Caſe if Delivery was always required.

There is a Species of Appointment in the Nature of a Donation *Mortis Causâ*, which may take Effect without Delivery; as when a Perſon upon his Death-Bed draws a Bill upon his Banker, and, by Writing indorſed upon it, declares that the Money is to be applied for the Benefit of a Perſon for a particular Purpoſe, which *neceſſarily ſuppoſes Death*, this Appointment will be conſidered as in the Nature of a Donation *Mortis Causâ*, and be ſupported as ſuch. Thus in the Caſe of *(m)* Lawſon *v.* Lawſon, A, on his Death-Bed, drew a Bill upon a Goldſmith, to pay 100l. to A's Wife *to buy Mourning*, and ſoon afterwards died. It was determined that the Bill was not a mere Authority which expired upon A's Death, but operated as an Appointment of ſuch a Nature as before mentioned.

(i) D. L. 39, Tit. 6, l. 28. *(k)* 1 Veſ. Jun. 111. *(l)* 1 Veſ. 314. *(m)* 1 P. Will. 441.

In

In the above Caſe of *(n)* Tate *v.* Hilbert, the Chancellor obſerved, that the Report of the prior Caſe of Lawſon *v.* Lawſon, in Peere Williams, was not correct, as it appeared from the Regiſter's Book that the *Direction for Mourning* was indorſed upon the Bill in the *Donor's Hand-Writing*; and his Lordſhip approved of the Deciſion.

(n) 2 Veſ. Jun. 111.

DESCRIPTION

DESCRIPTION OF LEGATEES.

IN Caſes where Legacies are given to a deſcript Claſs of Individuals payable at a future Period, as *to the Children of B. when the youngeſt ſhould attain* 21, or to be divided amongſt them *upon the Death of C.*; it ſeems to be ſettled that any Perſon who can intitle himſelf under the Deſcription at the Time of diſtributing the Fund; viz. as well thoſe Children living at the Period of Diſtribution, tho' not born 'till after the Teſtator's Deceaſe, as thoſe born before and living at the Happening of that Event, will be permitted to take a ſhare of the Teſtator's Bounty.

In affirmance of this Propoſition may be adduced, the Caſes of *(a)* Graves *v.* Boyle, *(b)* Haughton *v.* Harriſon, *(c)* Maddiſon *v.* Andrew, *(d)* Elliſon *v.* Airey, *(e)* Baldwin *v.* Carver, *(f)* Attorney General *v.* Criſpin, *(g)* Con-

(a) 1 Atk. 509. *(b)* 2 Atk. 329. *(c)* 1 Ves. 57.
(d) 1 Ves. 111. *(e)* Cowp. 309.
(f) 1. Brown Ch. Ca. 386. *(g)* Ibid. 530.

greve

greve *v.* Congreve, Bartlet *v.* Hollister, in a Note to the last Case; *(h)* Devisme *v.* Mello, *(i)* Gilmore *v.* Severn, *(k)* Hughes *v.* Hughes, *(l)* Andrews *v.* Partington, *(m)* Pulsford *v.* Hunter, *(n)* Prescot *v.* Long, and *(o)* Hoste *v.* Pratt.

There is a Case which appears incapable of Reconciliation with the above determinations on this Subject; viz. *(p)* Horsley *v.* Chaloner: however, the Authority of that Case seems to be clearly over-ruled by the subsequent contrary Decisions, in the several Cases before referred to; the principle which prevailed in those Cases, appears to have been founded upon this Reason, viz. that where the Time "appointed for Distribution of the given Fund is *not immediate*, but postponed to a *future period*, no Inconvenience would be occasioned in letting in any Person to take a part of it, who might answer the Description of the Gift at any Time before the Arrival of that Period."

But there is a necessary Exception indeed to the Rule as settled by the Cases before referred to, when *Natural* Children are the Objects intended to be benefited under a general Description of Children; for it appears from the Case of *(q)*

(b) Ibid. 537. *(i)* Ibid. 582.
(k) 3 Brown Ch. Ca. 352. 434. *(l)* Ibid. 401.
(m) Ibid. 416. *(n)* 2 Ves. Jun. Ch. Ca. 690.
(o) 3 Ves. Jun. 730, *(p)* 2 Ves. 83. *(q)* 1 P. Will. 529.

Metham

Metham *v.* Duke of Devon, that under a Bequeſt to the *Natural Children of B.* thoſe only who were living *at the Date and making of the Will*, will be conſidered as anſwering the Deſcription; the principal Reaſon of this Diſtinction, between Legitimate and Natural Children, appears to be founded in the diſability of the latter by *Policy of Law*, from acquiring any ſpecies of Intereſt or Property, before they have obtained a name by Reputation.

The Time appointed for Diſtribution of the Legatory Fund, being the Period which the Court of Chancery has limited for fixing *unchangeably*, the Number of Perſons to take by Deſcription, as Legatees; it neceſſarily follows, that when a Legacy is to take effect *immediately*, in all its Conſequences at the Teſtator's Death, the *Perſons only* who anſwer ſuch general Deſcription *at that Time*, are entitled to Shares in the Bequeſt. The following Caſes may be conſidered as ſupporting this Propoſition, viz. *(r)* Heath *v.* Heath, *(s)* Hill *v.* Chapman, *(t)* Roberts *v.* Higman, and *(u)* Viner *v.* Francis. In thoſe Caſes the Gift to the Legatees was *general*, no Time being fixed for Payment, the Funds there-

(*r*) 2 Atk. 121.

(*s*) 1 Veſ. Jun. Ch. Ca. 405. (*t*) 1 Brown Ch. Ca. 532. Note. (*u*) 2 Brown Ch. Ca. 658.

fore

fore being diſtributable at the Expiration of a Year after the Teſtator's Death, adventitious Legatees coming into Exiſtence after that Period could not be admitted; but ſuppoſe the Caſe to happen of a Child being born within the Year after the Teſtator's Death, it may be inferred, from attending to the Principle of the other Caſes, that ſuch a Child would be intitled to a ſhare in the Bequeſt, equal to the other Children living at the Teſtator's Deceaſe.

The Queſtion whether an Infant *en ventre ſa mere*, can take a ſhare in a Fund bequeathed to Children, under a general Deſcription of *Children living at the Teſtator's Death* does not appear to have been finally ſettled until very lately by the Judgment of the Court of Common Pleas, in favour of the Infant in the Caſe of *(v)* Clarke *v.* Blake, ſent out of Chancery for their opinion, and by a Decree of Lord Loughborough, C. aſſiſted by two Judges, and the Maſter of the Rolls, in the Caſe of *(x)* Woodford *v.* Thelluſon, the Caſes determined prior to the two laſt mentioned are contradictory, which Circumſtance may not render it altogether uſeleſs to diſtinguiſh them, and to ſubmit to the Reader, a few obſervations upon their Principle. The other Determina-

(v) 2 Brown Ch. Ca. 320. continued in 2 Ves. Jun. Ch. Ca. 673. *(x)* Trin. Term. 39. Geo. 3. 1799.

tions

tions in favour of the Infant, are contained in the Caſes of *(y)* Beale *v.* Beale, *(z)* Hale *v.* Hale, *(a)* Millar *v.* Turner, and *(b)* Clarke *v.* Blake. The Deciſions to its Diſadvantage are compriſed in the Caſes of *(c)* Pierſon *v.* Garnet, and *(d)* Cowper *v.* Forbes, determined at the Rolls.

In peruſing the above Caſes, it is ſufficiently obvious, that the Maſter of the Rolls, founded his Decrees upon the Reaſoning of Lord Hardwicke, in the Caſe of *(e)* Elliſon *v.* Airey, and that the Chancellors, and Judges, grounded their Judgments upon the Teſtator's general Intention, and the Capacity of an Infant *en ventre ſa mere*, to take as *a living Child* for its own Benefit. The Weight of the latter Reaſons, have prevailed in caſting the Balance in favour of the Infant, and it could hardly be contended with any Degree of Plauſibility, that a Teſtator intended, when he gave the Legacy in ſuch general Terms to the Children of B. to exclude a Child of B. becauſe it happened not to come into Exiſtence, for a few Days or Weeks after the Teſtator's Death. Beſides the View in which the Law beholds ſuch Children, in other Caſes, is compleatly in favour

(y) 1 P. Will. 244. *(z)* Prec. Ch. 50. *(a)* 1 Ves. 85. *(b)* 2 Brown Ch. Ca. 320. continued in 2 Ves. Jun. Ch. Ca. 673. *(c)* 2 Brown Ch. Ca. 38. *(d)* Ibid. 63. *(e)* 1 Ves. 111.

of a

of a Child *en ventre ſa mere*, taking as a Child in Exiſtence, viz. it may be vouched in Warranty, (*f*) and may take under the Statute of Diſtributions, *as if living* at the Inteſtate's Death; (*g*) it is alſo conſidered as a Child in Exiſtence, ſo as to prevent a Remainder over taking Effect, on the Event of the Teſtator's Death, *without leaving Iſſue.* (*h*) A Bill may be brought on its Behalf while *in Utero*, to ſtay Waſte committing to its Diſadvantage, (*i*) and it may be the Subject of Murder. (*k*) In the Caſe of (*l*) Bennett *v.* Honywood, determined by Lord Apſley, Chancellor; his Lordſhip refuſed Permiſſion to an Infant *en ventre ſa mere*, at the Teſtator's Death, to take jointly with other Perſons related to the Teſtator, under a Bequeſt of 20,000l. *to ſuch of his, the Teſtator's Relations, by Conſanguinity, as ſhould appear to his Executors to be worth no more than 2000l. each, and who ſhould apply for payment of their reſpective Shares, within two Years after his Deceaſe*, obſerving that the Court had never put ſuch a Conſtruction upon a Will, but in the Caſe of a *Deviſe to Children:* I have not indeed met with another modern Caſe where the Court was called upon, to decide on the Capability of an Infant *en ventre*

(*f*) 1 Inſt. 390. a. (*g*) 1 Ves. 156.
(*h*) 1 P. Will. 486. (*i*) 2 Vern. 710. (*k*) 3 Inſt. 50. 51.
(*l*) Ambl. 708. 711.

ſa mere

ſa mere, to take when ſuch Child was more remotely allied to the Teſtator than a Grand-child, but I ſhould think, notwithſtanding the Caſe laſt referred to, that the Principle which governed the former Caſes, in favour of ſuch Children, would extend to comprize them in all Caſes of Bequeſts, *to the Benefit* of which they would be intitled if born, except only in thoſe Inſtances, where the Objects of the Teſtator's Bounty are conſidered as particularly alluded to from the manner of the Gift.

The Word *Heirs*, has been conſidered as ſynonimous to Children; thus where a Legacy was bequeathed to the *Heirs* of *B.* it was determined, that B's *Children* only, and not their Decendants, ſhould have the Legacy (*m*).

The Word *Children*, is naturally a word of Purchaſe, and is never conſidered by way of Limitation, unleſs it be to effectuate the Teſtator's Intention (*n*). A. bequeathed four Parts of his reſiduary, real and perſonal Eſtate, to his *Niece B. and the Children born of her Body;* B. had no Child at the making of the Will, but had one born afterwards, and dies in the Teſtator's Lifetime: It was determined, that B and her Child took as joint Tenants, and that the latter ſur-

(*m*) Loveday *v.* Hopkins, Ambl. 273. (*n*) Wild's Caſe, 6 Co. 17.

viving the Teſtator, took the whole by Survivorſhip (*o*).

In Order to anſwer the Occaſions of Families, and the Intent of Parties, *younger Children* have been conſtrued to mean ſuch Children only as were not intitled to the *family* or *real* Eſtate. Thus, in Proviſions made for younger Children, whether by *Deed* or *Will*, the family Eſtate being limited to the eldeſt Son and his Iſſue, with Remainder to his Brothers and their Iſſues *ſucceſſive*, a younger Brother, who has eventually before the Time of Payment of the Proviſion become entitled to the family Eſtate, has been conſidered as *an eldeſt* Child, ſo as to exclude him from the Benefit of the Proviſion for younger Children; which happened in the Caſes of (*p*) Chadwick *v.* Doleman, (*q*) Jermyn *v.* Fellows, (*r*) Teynham *v.* Webb, and (*s*) Broadmead *v.* Wood.

An *eldeſt Daughter*, deſtitute of Proviſion, has alſo been conſidered as a *younger Child*, to anſwer the Deſcription and Intention; as appears from the Caſes of (*t*) Beale *v.* Beale, (*u*) Heneage *v.* Hunloke, and (*x*) Pierſon *v.* Garnet.

And an *eldeſt Son* has been conſidered as a *younger Child* when the family Eſtate was given

(*p*) 2 Vern. 528. (*q*) Forreſt. 93. (*r*) 2 Veſ. 198. (*s*) 1 Brown Ch. Ca. 77. (*t*) 1 P. Will. 244. (*u*) 2 Atk. 456. (*x*) 2 Brown Ch. Ca. 39. (*o*) Buſſar *v.* Bradford, 2 Atk. 220.

away

away from him, (*y*) Duke *v.* Doidge. But we muſt take Notice in the Application of the above Doctrine, that a younger Child is never conſidered as an eldeſt, nor, *vice verſâ*, an eldeſt as a younger Child, except *between Parents and Children*, or Children and Perſons ſtanding *in Loco Parentum* (*z*); for in all other Caſes, the Legatee muſt anſwer the Deſcription in the Will, or elſe he cannot make out a valid Claim. Thus an *eighth* Child living at *B*'s Death, cannot take under a Bequeſt to the *ſeventh* Child of *B*, the Child anſwering the Deſcription of the ſeventh being then dead (*a*).

Grandchildren, *Great-Grandchildren*, &c. may take under the general Deſcription of *Children*; Children being conſidered as ſynonimous to Iſſue, a Term comprehending Grandchildren and all other Deſcendants (*b*). Thus if a Legacy be given to the *Children* of *A*, and *A* die *without* Children, but leaving *Grandchildren*, the latter (if Grandchildren by *Blood*) will be conſidered as anſwering the Deſcription of the Bequeſt to Children; as appears from the Caſes of (*c*) Wyth *v.* Blackman, and (*d*) Huſſey *v.* Lady Dillon.

(*y*) 2 Veſ. 203, Note. (*z*) Hall *v.* Hewer, Ambl. 203. (*a*) Weſt *v.* Lord Primate of Ireland, 3 Brown Ch. Ca. 148. Sherer *v.* Biſhop, 4 Brown Ch. Ca. 55. (*b*) 1 Veſ. Jun. Ch. Ca. 150. 3 Veſ. Jun. C. C. 421. (*c*) 1 Veſ. 196, 201. Ambl. 555, S. C. (*d*) Ambl. 603.

But if *A* happen to die leaving *a Child* and *ſeveral Grandchildren*, the latter will be excluded, as not anſwering the Deſcription equally with the Child; (*e*) Cooke *v.* Brookeing.

It was determined at the Rolls, in the Caſe of (*f*) Mayet *v.* Mayet, that *Couſins once removed*, and *a Grand-Niece*, were included under a Bequeſt to the *firſt* and *ſecond* Couſins of the Teſtator.

In Caſes where Legacies are given to *a Part only* of a Number anſwering the ſame Deſcription, but none of them is particularized, the Court of Chancery has not, in ſuch Inſtances, quaſhed the Bequeſt for uncertainty, but rejected the Words creating it, and admitted the whole Number of Perſons anſwering the Deſcription to participate equally in the Bequeſt. As if a Legacy were given to the *three* Children of A, and A had *four* Children, the Court would reject the Word *three*, and admit all the Children of A to take equal Shares in the Legacy. And to this Effect are the Caſes of Tomkins *v.* Tomkins, cited in (*g*) Caſtledon *v.* Turner, (*h*) Sleech *v.* Thorington, and (*i*) Stebbing *v.* Walkey.

§ When the Terms adopted by a Teſtator, in Reference to the Objects of his Bounty, are ſo

(*e*) 2 Vern. 107. (*f*) 2 Brown. Ch. Ca. 175. (*g*) 3 Atk. 257. (*h*) 2 Veſ. 561. (*i*) 2 Brown. Ch. Ca. 85.

large, that the Court cannot diſcriminate the particular Perſons intended to be benefited, as where Legacies are given to *Relations* generally, without particularizing any of them, the Court will, in Order to effectuate the Intention, direct the Legacies to be paid to ſuch of the Teſtator's Relations as would be entitled under the Statute of Diſtributions (*k*); thus making that Act the *Rule* and *Meaſure* of the Diſtribution. And ſo it appears from the Caſes of (*l*) Whithorne *v.* Harris, (*m*) Harding *v.* Glynn, (*n*) Roach *v.* Hammond, (*o*) Thomas *v.* Hole, (*p*) Green *v.* Howard, (*q*) Edge *v.* Saliſbury, and (*r*) Rayner *v.* Mowbray.

But notwithſtanding the Statute of Diſtribution, be in the Caſes before mentioned the *Rule* which regulates *the Degree*, in which Relations ſhall take under a general Deſcription of Relations, yet the Will under which they claim will govern as to what Proportions and Shares ſuch Relations ſhall divide the fund. Thus, in the Caſe of (*s*) Thomas *v.* Hole, before referred to, the Bequeſt being to Relations, *to be equally divided amongſt them*, Lord Talbot decided, that the Brothers, Nephews, and Nieces of the Teſta-

(*k*) 22 and 23 Car. 2, C. 10, explained by 29 Car. 2, C. 30. (*l*) 2 Veſ. 527. (*m*) 1 Atk. 468. (*n*) Pre. Ch. 401. (*o*) Forreſt. 251. (*p*) 1 Browne Ch. Ca. 31. (*q*) Ambl. 70 (*r*) 3 Browne Ch. Ca. 234. (*s*) Forreſt. 251.

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tor ſhould take, *per Capita, equally;* and to the like Effect is the Caſe of Philips *v.* Garth (*t*).

Relations *by Marriage* will not be conſidered as included under a Bequeſt to Relations generally. And ſo are the Caſes of (*u*) Worſeley *v.* Johnſon, (*v*) Davies *v.* Bailey, and (*x*) Maitland *v.* Adair.

Although the Court of Chancery has adopted the Statute of Diſtribution as a Guide to the Conſtruction of the Word Relations, *ex Neceſſitate,* yet if the Teſtator's Intention appear to comprize Relations in a Degree more remote than thoſe who would be entitled under that Statute, ſuch Intention will prevail, becauſe the Act is *a Subſtitution* only when the Intent cannot be found. And to this Purpoſe is the Caſe of Greenwood *v.* Greenwood, in a Note to Green *v.* Howard (*y*).

A Diſtinction has been attempted in Favour of more diſtant Relations than the Statute allows, when the Words *poor* or *pooreſt* preceded the Word Relations, or in Favour of particular Relations in an equal Degree. Upon this Diſtinction the Deciſion of an anonymous Caſe (*z*),

(*t*) 3 Browne Ch. Ca. 64. (*u*) 3 Atk. 758. (*v*) 1 Veſ. 84. (*x*) 3 Veſ. Jun. Ch. Ca. 231. (*y*) 1 Browne Ch. Ca. 32. (*z*) 1 P. Will. Page 327.

in Peere Williams, was founded; but the Reporter, at the Foot of the ſame Caſe, obſerves, that it was a *ſtrained Interpretation* in Favour of the Relative. And in the Caſe of (*a*) Brunſden *v.* Woolredge, Sir Thomas Sewell, the then Maſter of the Rolls, upon the ſame Principle, decreed the Legacy to be divided amongſt *poor Relations.* But it appears to me that this Difference, as an Exception to the Rule, has not ſince been attended to, upon the Ground of the Difficulty and Uncertainty of diſtinguiſhing between the different Degrees and Shades of Poverty. Thus, in the Caſes of (*b*) Iſaac *v.* Defriez, the Words were *pooreſt Relations;* and in (*c*) Widmore *v.* Woodroffe, *the moſt neceſſitous* of the Teſtator's Relations; and in both of theſe Caſes it was determined, that Relations only who were intitled under the Statute of Diſtributions, ſhould receive thoſe Legacies.

It has alſo been attempted to fix to the Word *Deſcendants* the ſame extenſive Meaning, with Reſpect to the Deſcription of the Legatees, as to the Word Relations; but the Court has conſtantly refuſed the Application, as the Principle which governs the latter does not apply to the former Caſe; inaſmuch as the Teſtator's Intention may be clearly aſcertained, when he

(*a*) Ambl. 507. (*b*) Ambl. 595. (*c*) Ambl. 636.

ſpeaks

ſpeaks of the Deſcendants of a certain Stock or Family. And to this Effect are the Caſes of (*d*) Croſsly *v.* Clare, (*e*) Pierſon *v.* Garnett, and (*f*) Butler *v.* Stratton.

The Admiſſion of parol Evidence to explain Doubts or Difficulties ariſing upon Inſtruments, has been for a long Time watched over by Courts of Juſtice with a jealous Eye; it is conſidered as an unſound Mode of Interpretation, and ſome of the modern Judges have expreſſed themſelves of Opinion, that Juſtice would have been better and more fairly adminiſtered, if parol Evidence had never been admitted. But as the Province of Judges is merely to diſpenſe the Law as they find it ſettled, they have conſidered themſelves bound to admit this Kind of Evidence in certain Caſes in which it has been allowed and eſtabliſhed by prior Adjudications. One of the Inſtances in which ſuch Evidence has been admitted is, in Caſes of *wrong* or *imperfect* Deſcriptions of Legatees, and to *aſcertain* Legatees when their Names have been *miſpelled*, or *miſtaken*, as appears from the Caſes of (*g*) Hampſhire *v.* Pierce, (*h*) Maſters *v.* Maſters, and (*i*) Abbot *v.* Maſſie.

(*d*) Ambl. 397. (*e*) 2 Brown Ch. Ca. 38, 230. (*f*) 3 Brown Ch. Ca. 367. (*g*) 2 Veſ. 216. (*h*) 1 P. Will. 425. (*i*) 3 Veſ. Jun. Ch. Ca. 148.

There is a Caſe indeed which controverts this Propoſition, ſo far as relates to imperfect Deſcriptions of Legatees, but it remains of very doubtful Authority. The Caſe was thus: *A*, by his Will, gave to the Son and Daughter of *W* a Legacy of 100*l*. *W* had *four* Sons and *one* Daughter; and upon the queſtion which of the Sons of *W* was intended, it was determined, that none of the Sons ſhould take the Legacy on Account of the *Uncertainty* in the Deſcription (*k*).

This laſt Caſe militates againſt the Principle of every Deciſion which has been made upon the Subject. It was ſo conſidered by the Chancellor, in the Caſe of (*l*) Delmere *v.* Robello; and his Words in Reference to the above Caſe of Dowſet *v.* Sweet, were as follow: "It is "almoſt impoſſible to ſay, that if there be a "Bequeſt to the Son and Daughter of one who "at the Time of the Bequeſt has *four* Sons and "a Daughter, there is not ſuch a Diſſonance "between the State of the Facts and of the Be-"queſt, as to let in ſatisfactory Evidence that "*one* Son was meant, *as it is clear that he meant* "*one;* it is within all the Rules of *patent Ambi-*"*guities:* therefore I ſuppoſe that Caſe of Dow-"ſet *v.* Sweet went upon the Ground, that the "Evidence was not ſufficient to ſhew the In-"tention, and then it became uncertain."

(*k*) Dowſet *v.* Sweet, Ambl. 175. (*l*) 1 Veſ. Jun. Ch. Ca. 415.

But

But if there be an *entire Omiſſion* of the Legatee's Name or Deſcription, the Omiſſion will be fatal, and parol evidence cannot be admitted to ſupply the Defect, and aſcertain the Legatee. To this Effect are the Caſes of (*m*) Baylis *v.* the Attorney General, and (*n*) Hunt *v.* Hort.

Where the Difference in *Condition* or *Situation* of the *Perſon deſcribed*, and the *Perſon ſuppoſed to be intended to take the Legacy*, is ſuch, as to raiſe a legal Inference that the Perſon named could not be the Perſon intended by the Teſtator, the Court of Chancery has, in ſuch Caſes, upon the Reaſoning of patent Ambiguity, let in parol Evidence to ſhew the Miſtake, and cure the Defect. Thus if a Bequeſt was made to the Daughter of *B*, *A*'s Daughter, when it appears that *B* was ſingle, and without Iſſue, but *C*, another Daughter of *A*, was married at the Date of the Will, and had a Daughter then living, parol Evidence would be admitted to remove the Ambiguity. See the Caſes of (*o*) Bradwin *v.* Harpur, and (*p*) Parſons *v.* Parſons.

(*m*) 2 Atk. 239. (*n*) 3 Brown Ch. Ca. 311. (*o*) Ambl, 374. (*p*) 1 Veſ. Jun. Ch. Ca. 266.

ON SPECIFIC LEGACIES,

AND THE

ADEMPTION OF THEM.

A SPECIFIC individual Legacy, may be defined to be "the Bequeſt of a particular thing, ſpeci-"fied and diſtinguiſhed from all other Things of "the ſame Kind, as of a Horſe, a Piece of Plate, "a Term for Years, and the like, which would "veſt immediately upon Aſſent of the Execu-"tor." It differs from a pecuniary Legacy in this, *viz.* that if there be a Deficiency of Aſſets, the ſpecific Legacy ſhall not abate with the *pecuniary Legacies* (*a*); and on the other Hand, if ſuch ſpecific Legacy be diſappointed, the ſpecific Legatee ſhall have no Recompenſe in Satisfaction out of the Teſtator's perſonal Eſtate. (*b*)

There are moreover, Legacies *of Quantity, in the Nature of ſpecific Legacies;* as of ſo much

(*a*) 1 P. Will. 422 539. (*b*) 3 Bro. C. C. 160.

Money

Money with Reference to a particular fund for Payment. (*c*) This ſort of ſpecific Legacy, differs ſo much from that firſt deſcribed, that if the fund be called in, or fail, the ſpecific Legatee ſhall not loſe his Legacy, but be permitted to receive the Value of it out of the general Aſſets of the Teſtator.

This latter ſpecies of ſpecific Bequeſts, has been queſtioned by a high legal Authority, who denied the Diſtinction; but upon examining the Caſes prior to that alluded to, and thoſe ſince determined, it appears doubtful whether the Opinion given in that Caſe has been acquieſced in. The Caſe referred to, is (*d*) Aſhburner *v.* Mac Guire, in which Lord Thurlow admits the Diſtinction, as before mentioned, to have been made in the Caſes, but diſagrees with the Principle of them. In (*e*) Saville *v.* Blacket, (*f*) Ellis *v.* Walker, (*f*) Attorney General *v.* Parkin, and Cartwright, *v.* Cartwright, cited in (*g*) Aſhburner *v.* Mac Guire, the Diſtinction is taken and acknowledged; and in a late Caſe, determined by Lord Loughborough, the ſame Diſtinction ſeems to have been admitted with ſome Qualification. The Caſe was to the following Effect: (*h*) *A*, reciting in his Will, that

(*c*) Touchſt. 430. Raym. 335. (*d*) 2 Bro. C. C. 108. (*e*) 1. P. Will. 779. (*f*) Ambl. 309. 566. (*g*) 2 Bro. C. C. 114. (*h*) Coleman *v.* Coleman, 2 Ves. Jun. C. C. 639.

he was poſſeſſed of a Bill of Exchange, drawn in his favour, upon the Eaſt India Company, and accepted by their Order and entered in their Books, for the Sum of 1500l. bearing Intereſt at 3l. per Cent. gave to his Wife the Intereſt of the Bill for Life, and directed, that after her Deceaſe, the ſame ſhould be ſold, and the Money equally divided amongſt ſeveral Nephews and Nieces, with Survivorſhip amongſt them, if any of them died in the Wife's Lifetime; and he alſo gave his Wife all his houſehold Goods, &c. and appointed her Executrix: the Teſtator after making his Will, received from the Eaſt India Company the Amount of the Bill, which conſtituted the Bulk of his Property, and lent the Money upon perſonal Security, and afterwards called in 100l. Part of it, ſo that 1400l. only, was due to him at his Death. Upon a Bill, filed by the Nephews and Nieces, againſt the Executrix, the Queſtion was, whether the Receipt by the Teſtator, of the Amount of the Bill, during his Life, was an Ademption of the Bequeſt? which depended alſo upon another Queſtion, viz. what was the Nature of the Legacy? It was inſiſted upon for the Plantiffs, that there could be no Intention in the Teſtator to adeem the Legacy, by receiving the Amount of the Bill, becauſe the Bill was taken up and paid by the Company, *in their uſual Courſe of Payments*; and beſides, that the Legacy was not ſpecific, although it was given with Reference to the Bill as a Security. And it was contended for

the

the Defendant, that the Bequeſt was ſpecific, and adeemed, and that the Diſtinction between a voluntary and compulſory Payment was exploded. The Chancellor gave Judgment to the following Effect: "It has been ſaid, that the Diſtinction "between a *voluntary* and *compulſory* Payment "is exploded; the Application of the Diſtinction "may often fail extremely in the particular Caſe, "but where the Teſtator is compelled to receive "Payment of the Debt, a pretty ſtrong Preſumption ariſes, that there is no variation of Intention; where he goes of himſelf, no Neceſſity urging him, and deſtroys the Form of the Thing "ſpecifically given, that is a good Ground of Argument the other Way. I think Lord Camden decided very rightly, (alluding to his Deciſion, in "the Attorney General *v.* Parkin, Ambl. 566) "and I remember he gave a very able Opinion: "he conſidered upon the whole Will, that the Intention was to give every thing to the College, "*not that identical Mortgage*, but *all* Mortgages, *all* Bonds, *all* Securities; it was "only a Method of deſcribing all his perſonal "Eſtate, placed out upon Intereſt. *The Diſtinction will not determine all Caſes:* the Nature of "the Legacy, the particular Will muſt be conſidered; it is not a diſtinct Propoſition to ſay, "ſuch a Legacy is ſpecific, and all ſpecific Legacies are *ejuſdem Generis; there is a Difference whether a ſpecific Thing is given, or a "Legacy equivalent to Money marked with Reference to a particular Security, as a Bond;* it is

ſpecific

" ſpecific *quoàd* the Legatee, ſo as that it ſhall " not abate when it is with Reference to a par- " ticular Fund; but the Defendant has great " Difficulty from the particular Frame of this " Will, for it is inconſiſtent with common Senſe, " that he ſhould have given in the Manner he has " with Reference to *a Bit of Paper*, and not with " Reference *to the Sum;* giving an Intereſt for " Life, in the Intereſt of a Bill of Exchange, he " did not mean to deſtroy her Intereſt for Life, " if the Bill was paid: he conſidered it as a per- " manent Security; he had no Diſtinction in his " Mind between a Bill of Exchange upon the " India Company, and India Stock: he creates " Survivorſhip after the Death of his Wife, who " is now living. It is ſtronger with Regard to a " Bill of Exchange upon the Company, than a " common Bond; for to a reaſonable Certainty, " there muſt come a Time, when that Bill will be " paid: but it is very common to let Money reſt " upon a Bond; upon the particular Frame of this " Will, there is no Doubt it was in Fact the Bulk " of his Fortune." The Weight of this and the other Caſes before referred to, joined with the great Anxiety the Court has ſhewn upon every Occaſion, to conſtrue Bequeſts as *pecuniary*, on Account of the Conſequences attending ſpecific Bequeſts, appears to have fixed the Diſtinction as above ſtated:---See alſo the Caſe of (*i*) Roberts *v.* Pocock.

(*i*) 4 Ves. Jun. 150.

Legacies

Legacies of *Stock*, are either *ſpecific* or *general*, according to the Intention of the Teſtator, as collected from the Words in his Will, fixing or not fixing the Bequeſt to Stock he poſſeſſed at the Time of making ſuch Will. "My" preceding the Word *Stock*, has been frequently adjudged ſufficient to make the Legacy ſpecific; therefore, if I bequeath to *B my* capital Stock of 1000l. in that of the India Company, the Legacy would be conſidered as *ſpecific*, (*i. e.*) applicable only to ſuch Stock as the Teſtator had in that Fund, at the Date of his Teſtament. To this Purpoſe ſee the Caſes of (*k*) Sleech *v.* Thorrington, (*l*) Drinkwater *v.* Falconer, and (*m*) Aſhburner *v.* Mac Guire. And in Caſes where the ſpecific Stock happens to have been ſold after the Teſtator's Death, the Court of Chancery will order it to be replaced according to the Value of Stock, at the Expiration of the Year after the Teſtator's Deceaſe, as the ſpecific Stock was then transferable to the Legatee; (*n*) Morley *v.* Bird.

It ſeems that the mere Poſſeſſion of Stock, or Stock of equal or greater Amount than that bequeathed at the Time of making the Teſtament, will not (without Words of Reference, or an Intention collected from the Will, that the Teſtator meant

(*k*) 2 Ves. 560. (*l*) Ibid. 623. (*m*) 2 Bro. C. C. 108. (*n*) 3 Ves. Jun. C. C. 631.

the

the *identical* Stock he was then poſſeſſed of) convert the Legacy into a ſpecific one; and to this Effect are the Caſes of (*o*) Partridge *v.* Partridge, (*p*) Purſe *v.* Snaplin, (*q*) Sleech *v.* Thorrington, (*r*) Peterborough *v.* Mortlok, (*s*) Branſdon *v.* Winter, and (*t*) Simmons *v.* Vallance. But in a (*u*) Caſe wherein *A* bequeathed to Truſtees 6000l. So. Sea Annuities, in Truſt, *to ſell and lay out in the Purchaſe of Lands*, to be ſettled, &c. and afterwards, by Codicil gave them the further Sum of 1200l. to the ſame Uſes; the Teſtator having 5360l. in Annuities at the date of the Will; the Court determined that the Legacy was ſpecific, and therefore that the Deficiency ſhould not be made good out of the Teſtator's other perſonal Eſtate.

It is obvious, that in the above Caſe, there were no expreſs Words of Reference uſed by the Teſtator, in Relation to any particular Annuities which he had at the Date of his Will; ſo that the Inference that he intended thoſe identical Annuities, muſt have ariſen from the Circumſtance of their being given to the Truſtees, by Way of *preſent Legacy* in Truſt *to ſell* (although no ſuch Reaſon is aſſigned by the Court in its Judgment);

(*o*) Forreſt. 226. (*p*) 1 Atk. 414. (*q*) 2 Ves. 560. (*r*) 1 Bro. C. C. 565. (*s*) Ambl. 57. (*t*) 4 Bro. C. C. 345. (*u*) Aſhton *v.* Aſhton, Forreſt. 152. 3 P. Will. 384. S. C.

and

and that the Difference in Amount between the Annuities the Teſtator had at the Time of making his Teſtament, and thoſe expreſſed to be bequeathed by him, proceeded purely upon a miſcalculation of his Property.

There is a (*w*) Caſe indeed which directly militates againſt the Adjudications before referred to upon this Subject, and is to the following Effect: *A* having, at the Date of his Will, 2072l. 3s. Bank Annuities, and 2000l. Eaſt India Stock, bequeathed to *B* and *C* 2072l. 3s. capital Stock, in the Bank of England, and 2000l Sterling capital Stock in the Engliſh Eaſt India Company, the Teſtator having reduced the Bank Stock to 2000l. a Queſtion aroſe, whether thoſe Legacies were ſpecific or not? and it was determined by Forteſcue, Maſter of the Rolls, that they were ſpecific upon the Principle of their *Equality*, with the Stock at the Date of the Will. It appears from the Report of this Caſe, that the Maſter of the Rolls endeavoured to avoid the Preſſure of the ſeveral Authorities before referred to, by aſſigning different Reaſons as the Grounds of the ſeveral Decrees pronounced in them; it is obvious, however, from peruſing thoſe Caſes, that the Principle which governed their Deciſions was, a Want of Words referring to the Stock exiſting at the Date of the Will, or of manifeſt Intention in the Teſtator that he

(*w*) Jeffreys *v.* Jeffreys, 3 Atk. 120.

alluded to it; and not the ſimple Fact of the Teſtator's having, or not poſſeſſing Stock, at that Period of any particular Amount. In (*y*) Bronſdon *v.* Winter, the Stock which the Teſtator had at the making of his Teſtament, was *equal* to the Stock *bequeathed*; and in (*z*) Partridge *v.* Partridge, the Stock in Poſſeſſion of the Teſtator *exceeded* the Amount of that bequeathed, nevertheleſs for Want of proper Words to fix the Legacy to the then exiſting Stock, they were adjudged to be *general Legacies only*.

Money, if properly deſcribed, may be the Subject of a ſpecific Bequeſt; as if *A* bequeath to *B a Sum of Money, depoſited in ſuch a Cheſt* or *Bag*, or *in ſuch a Perſon's Hands*, or *in ſuch a Frank*, or *Book*; theſe and the like Deſcriptions, will amount to a ſufficient Specification of the Thing, or Money, intended to be given, ſo as to conſtitute the Legacy *Specific*; but as Money itſelf *quâ* Money, bears no Ear-Mark, it is therefore incapable of being the Subject of a ſpecific Bequeſt, without Reference to ſome collateral Thing, by which the Amount of it may be aſcertained, and the Money itſelf *identified*: to this Purpoſe are the Caſes of (*a*) Lawſon *v.* Stitch, (*b*) Hinton *v.* Pinke, and Alton *v.* Medlicot, cited in (*c*) Hume *v.* Edwards, and in (*d*) Lewen *v.* Lewen.

(*y*) Ambl. 57. (*z*) Forreſt. 226. (*a*) 1 Atk. 507. (*b*) 1 P. Will. 539. (*c*) 3 Atk. 693. (*d*) 2 Ves. 417.

If a Perſon poſſeſs perſonal Eſtate at three different Places, as at *A*, *B*, and *C*, a Bequeſt of the perſonal Eſtate *at B* will be a good *ſpecific* Bequeſt, and conſequently not applicable to contribute with *A* towards Payment of general Legacies, upon a Deficiency of the perſonal Fund at *C*; (*e*) Sayer *v.* Sayer.

ADEMPTION OF SPECIFIC LEGACIES.

The Subject upon Ademption of ſpecific Legacies, is neceſſarily involved in conſiderable Uncertainty, as the Fact of Ademption muſt always depend upon the particular Will, the Nature of the Legacy, and the Intention of Teſtators; there ſeems, however, to be ſome Rules laid down in the Caſes relating to this Matter, which I ſhall endeavour to extract, and ſimplify.

When Legacies are given *quâ* Money, *with Reference to particular Funds for Payment*, although the Funds may fail from being called in, or otherwiſe, yet the Bequeſts ſhall not be diſappointed; as in the Caſes of (*f*) Attorney General *v.* Parkin, (*g*) Bronſdon *v.* Winter, (*h*) Pulsford *v.* Hunter, and (*i*) Coleman *v.* Cole-

(*e*) Ch. Pre. 392. (*f*) Ambl. 566. (*g*) Ibid. 57. (*h*) 3 Bro. C. C. 416. (*i*) 2 Veſ. Jun. C. C. 639.

man. But when ſpecific Securities are bequeathed, or Legacies are given out of particular Funds, if it appear that the Teſtator intended to diſpoſe of *aliquot Parts* of thoſe Funds, if the Securities or ſuch Funds do not wholly, but in Part, only exiſt at the Teſtator's Death, the Legacies will be either totally, or in Part adeemed, as the Caſe ſhall happen; as may be collected from the Caſes of (*k*) Drinkwater *v.* Falconer, (*l*) Sleech *v.* Thorrington, (*m*) Aſhton *v.* Aſhton, (*n*) Backwell *v.* Child, and (*o*) Badrick *v.* Stephens.

A Diſtinction has been made by the early Caſes, when a Teſtator received a Debt ſpecifically bequeathed *at his own Inſtance*, and when the Debt was paid to him by the Debtor, *without any Application or Solicitation*, the Court of Chancery deciding in the former Caſe, that Receipt of the Debt was an Ademption of the Legacy, but in the latter, that Payment of it was no Ademption. See the Caſes of (*p*) Orme *v.* Smith, (*q*) Birch *v.* Baker, (*r*) Partridge *v.* Partridge, (*s*) Rider *v.* Wager, and (*t*) Crockat *v.* Crockat. We muſt obſerve, however, that this Diſtinction, as a *fixed poſitive Rule*, has been exploded by more recent Adjudications, inaſmuch as the Reaſons which might induce a Teſtator to call in the ſpe-

(*k*) 2 Veſ. 623. (*l*) Ibid. 560. (*m*) Forreſt. 152. (*n*) Ambl. 260. (*o*) 3 Bro. C. C. 431. (*p*) 1 Eq. Ca. Abr. 302. (*q*) Mos. 373. (*r*) Forreſt 228. (*s*) 2. P. Will. 328. (*t*) Ibid. 164.

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cific outſtanding Fund, might be quite foreign from an Intention to adeem the Legacy. To this Purpoſe, ſee the Caſes of the (*u*) Earl of Thomond *v.* Suffolk, (*x*) Ford *v.* Fleming, (*y*) Aſhton *v.* Aſhton, (*z*) Drinkwater *v.* Falconer, (*a*) Attorney General *v.* Parkin, and (*b*) Aſhburner *v.* Mac Guire.

Some of the Caſes laſt referred to reject the above Diſtinction, without any Qualification; but it ſeems (with due Deference to their Authority) that an Adherence to the old Rule, with a little Relaxation, would, in many Inſtances, be attended with no Impropriety. In various Inſtances, a Teſtator may be induced to call in a Debt, and change the Security, from many Motives beſides that of adeeming the Bequeſt; and one Motive might be, the *Preſervation of the Fund.* And in many other Inſtances he may be induced to call it in with a View only to defeat his Diſpoſition, and to apply the Produce to Purpoſes of his own, which might be unforeſeen at the Time of making his Teſtament. It ſeems, therefore, that in Order to find out the Motive of the Teſtator's altering the Fund, or calling it in, parol Evidence might be admitted to aſcertain *quo Animo* the ſame was done: I think the Rule may be laid

(*u*) 1 P. Will 464. (*x*) 2. P. Will. 469 (*y*) 3 P. Will. 384. (*z*) 2 Veſ. 623. (*a*) Ambl, 566. (*b*) 2 Bro. C. C. 108.

down as follows, in Conſiſtency with late Determinations upon the Subject: *viz.* "that if a Debt "be ſpecifically bequeathed, and is afterwards "received by the Teſtator, and no Reaſon ap-"pears why it was called in by him, ſuch Re-"ceipt will amount to an Ademption, but *that* "*if any Reaſon be given* for calling it in, then "no Ademption will be effected." See the Caſes of (*c*) Hamblin *v.* Liſter, and (*d*) Coleman *v.* Coleman.

Although the *ſpecific* Fund be annihilated by the Teſtator, after the Making of his Teſtament, yet, if it be *replaced* by him, and have Exiſtence at the Time of his Death, the Legacy will be revived, and take Effect. To this Purpoſe is the Caſe of (*e*) Partridge *v.* Partridge, and (*f*) Drinkwater *v* Falconer. But in Order to revive the ſpecific Legacy, under ſuch Circumſtances, the Money muſt be replaced in *the ſame Fund*, ſo as to *anſwer the Deſcription of the Bequeſt*, or elſe the Legacy will be adeemed in *Toto*, or in Part only, as the Caſe may happen: thus, if the Bequeſt was of ſo much *South-Sea Annuities*, the Replacement muſt be in that Kind of Stock, and none elſe; (*g*) Crockat *v.* Crockat, and (*h*) Pulsford *v.* Hunter.

(*c*) Ambl. 401. (*d*) 2 Veſ. Jun. C. C. 639. (*e*) Forreſt. 226. (*f*) 2 Veſ. 625. (*g*) 2 P. Will. 164. (*h*) 3 Bro. C. C. 416.

An

An Exception muſt be made, however, in Inſtances where the Alteration in the Fund is effected by *mere Act, or Operation of Law*, for ſuch Alterations will not be an Ademption of the Legacy, although the Terms of the Bequeſt ſhould happen to be inſufficient to embrace the Property in its new Shape. To this Purpoſe ſee the Caſes of (*i*) Partridge *v.* Partridge, and (*k*) Bronſdon *v.* Winter.

If the Fund be varied only *in a ſmall Degree*, or be *differently arranged* at the Teſtator's Death, from what it was at the Date of his Teſtament, as the Fund ſtill remains the *ſame in Subſtance*, ſuch Variation or Arrangement, will not cauſe an Ademption of the Legacy; (*l*) Backwell *v.* Child.

Upon the ſame Principle of Intention, it is laid down as a Rule, liable, however, to be rebutted, by ſhewing a different Intention, that, if the Bequeſt be of Goods &c. ſpecified to be in a *particular Place*, as in the Teſtator's Houſe at *B*, they muſt be there at his Deceaſe, in Order to give Effect to the Legacy; for if they be removed before that Period, it would then be preſumed, that the Teſtator had altered his Intention, and meant to adeem the Bequeſt. See the Caſes of

(*i*) Forreſt. 226. (*k*) Ambl 57. (*l*) Ambl. 260.

(*m*) Green *v.* Symonds, and (*n*) Land *v.* Devaynes. The Caſe of (*o*) Shaftſbury *v.* Shaftſbury, ſeems to be a very ſtrong Determination in Favour of the Rule; the Caſe was to this Effect: *A*, before he went abroad, for the Benefit of his Health, made his Will, and bequeathed to his Wife all the Plate, &c. which ſhould be in his Houſe at *C* at the Time of his Death. Whilſt *A* was from Home, his Steward procured the abſolute Owner of the Houſe to accept a Surrender of *A's* Leaſe; and in Conſequence of it, he removed *A's* Plate, &c. to another Houſe belonging to *A;* which Tranſaction was afterwards approved of by *A.* And upon a Queſtion, whether the Removal of the Plate, &c. under the above Circumſtances, was an Ademption of the Bequeſt, it was determined in the Affirmative. Now, it is obvious, that the Removal of the Plate, &c. in this Caſe, was of Neceſſity, *viz.* by Reaſon of the Surrender before mentioned, and evinced no Intention of adeeming, which is ever eſſential to Ademptions: on which Account, it ſeems doubtful whether this Caſe would be followed under ſimilar Circumſtances; and, eſpecially, as it is ſettled, that if Goods ſpecifically bequeathed are removed *for a neceſſary Purpoſe*, as to ſave them from Fire, and the like, ſuch

(*m*) 1 Bro. C. C. 129, Note. (*n*) 4 Bro. C. C. 537. (*o*) 2 Vern. 747.

Removal

Removal would be no Ademption. In the Caſe of (*p*) Chapman *v* Hart, Lord Hardwicke took a Diſtinction between Goods in a Houſe, and *Goods in a Ship;* his Lordſhip deciding in the latter Caſe, that Removal of Goods out of the Ship, before the Teſtator's Death, was no Ademption; and ſaid, that a Bequeſt of Property on Board of Ship muſt be ſuppoſed to be made, in Conſideration of the *ſeveral Contingencies and Accidents* to which they are liable; and that, ſhould it be determined, that if, by any Accident, the Goods ſhould not be on Board at the Time of the Teſtator's Death, they would not paſs to the Legatee, it would defeat ſeveral *Marine Wills.*

If the Thing ſpecifically given, be ſo altered at the Time of the Teſtator's Death, as no Part of it conſiſts of the ſame Materials as at the making of the Will, yet if ſuch Alteration was made *gradatim,* the thorough Change in the Subject will not effect an Ademption. Thus if *A* bequeathed to *B* a particular Houſe, and afterwards repaired it ſo often, as to leave no Part of the old Materials ſtanding at his Deceaſe, yet the ſpecific Deviſe of it to *B* would not be defeated. (*q*)

And if the Subject of the Bequeſt be not compleatly alienated, but *pledged* or *pawned* only,

(*p*) 1 Veſ. 273. (*q*) Swinb. Part 7, Sect. 20, Pages 523, 524.

the Executor muſt redeem it for the ſpecific Legatee (*r*).

With Reſpect to the Ademption of ſpecific Deviſes of Lands for Terms of Years, and for Lives, by the ſubſequent Surrenders of the Leaſes, for the Purpoſe of Renewal, the following Propoſitions may be collected from the Caſes determined upon the Subject.

First, As to Terms for Years.

If, from the penning of the Will, it appear that the Teſtator, in diſpoſing of his leaſehold Property, intended only to bequeath his preſent Intereſt therein, as when the Terms of the Bequeſt are, "the Leaſe which I *now* hold, &c." or "of my *Lands*, &c." without mentioning his Eſtate or Intereſt therein; and the Teſtator, after the making of his Will, ſurrenders *effectually* the old; and takes a new Leaſe of the Premiſes, ſuch Act will amount to an Ademption of the Bequeſt; (*s*) Abney *v.* Miller, (*t*) Rudſtone *v.* Anderſon, (*u*) Attorney General *v.* Downing, (*x*) Hone *v.* Medcraft, and (*y*) Coppin *v.* Fernyhough.

But if the Deviſe were thus, *viz.* "All the Eſtate, Right, and Intereſt, I have to come in

(*r*) Swinb. Page 525. (*s*) 2 Atk. 597. (*t*) 2 Veſ. 418. (*u*) Ambl. 571. (*x*) 1 Bro. C. C. 263. (*y*) 2 Bro. C. C. 291.

the

the Leaſe, at the Time of my Deceaſe," or "all my Intereſt therein" or "all the Profits, and Advantages accruing from it," I give to *B*, *B*'s Legacy will not be defeated by a ſubſequent Renewal, as thoſe Terms are large enough to include renewed Intereſts; (*z*) Carte *v.* Carte, and (*a*) Sterling *v.* Lydiard.

SECOND, As to Leaſes for Lives.

The Renewal of Leaſes, determinable upon Lives, will always create an Ademption of ſpecific Deviſes of them, as they are conſidered in the Nature of *freehold* Intereſts; and, conſequently new Intereſts in them obtained by Renewal, cannot paſs by a Will made previous to their Acquirement. See the Caſes of (*b*) Marwood *v.* Turner, and (*c*) Abney *v.* Miller,

(*z*) 3 Atk. 174, 176. (*a*) 3 Atk. 199. (*b*) 3 P. Will. 170. (*c*) 2 Atk. 597.

LEGACIES UPON CONDITION.

A LEGACY upon Condition may be defined "a Bequeſt whoſe Exiſtence depends upon the happening or not happening of ſome uncertain Event, whereby it is either to take Effect or be defeated." Theſe Conditions admit of a two-fold Diviſion, *viz.* into Conditions *precedent* and Conditions *ſubſequent*. The former are ſuch as muſt happen, or be performed *before* the Legacy *can veſt;* the latter are ſuch as by Non-Performance will defeat the Legacy already veſted. Thus if a Legacy were given to *A upon his Marriage with B*, this would be a *precedent* Condition, and muſt be performed before the Legacy could veſt. But if a Term were deviſed to *A*, *upon Condition that he pay to B* 100*l. at Michaelmas next after the Teſtator's Death*, this would be a Condition *ſubſequent*, and defeat the Deviſe to *B*, if not performed.

Conditions which are impoſſible at the Time of their Creation, or afterwards become ſo by the Act of God, or of the Teſtator, or which are contrary to Law, or repugnant to the Be-

queſt,

queſt, are conſidered as void: but we muſt notice that the Effect of theſe Conditions, in Relation to Legacies, is not always the ſame; for if the Condition be precedent, (*i. e.*) if it is to be performed before the Legacy veſt in Intereſt, and the Legacy is payable out of real Eſtate, although ſuch Condition be void from the Impracticability or Unlawfulneſs of the Performance of it, yet as the Legacy is given only upon the Terms of complying with the Condition, the Legacy, as depending upon it, muſt be alſo void (*a*). In this Inſtance the common and civil Laws differ; for by the latter, if the Condition were impoſſible, it was void, whether precedent or ſubſequent (*b*). However, in all Caſes of Conditions becoming void under the Circumſtances above mentioned, if ſuch Conditions be *ſubſequent*, the Legacies will be conſidered as abſolute in the Legatees, (*i. e.*) totally diſcharged from the Conditions.

A Condition is conſidered as *impoſſible at the Creation*, when the Performance of it was not, at any Period, within the Power of the Legatee: as if a Legacy were given to *B*, *if he drink up all the Water in the Sea.*

A Condition not impoſſible at its Creation, but become ſo afterwards *by the Act of God*,

(*a*) Shower's Parl. Ca. 83, 87. Co. Litt. 206. (*b*) Swinb. Part 4, Sect. 6, paſſim.

may

may be thus: *A* bequeathed a Legacy to *B*, *in Caſe he married the Teſtator's Daughter;* before the Marriage could take Place the Daughter died: in this Caſe the Condition was good in the Beginning, but became impracticable upon a ſubſequent and unavoidable Event.

A Condition not impoſſible at its Creation, but afterwards made ſo *by the Act of the Teſtator himſelf* (*c*), may be thus illuſtrated: A Legacy was given to *B* upon Condition that he buried the Teſtator in the Cathedral Church of St. Peter, at York: the Teſtator afterwards died *excommunicate*, for which Reaſon the *Rites of Sepulture* were denied him. It is obvious, in this Caſe, that the Condition was valid in its Creation, but rendered impoſſible to be performed by the ſubſequent Acts of the Teſtator.

A Condition is conſidered as *repugnant to the Nature of the Bequeſt, and contrary to Law*, when the Reſtraint impoſed is ſuch as is incompatible with the Enjoyment of the Legacy in ſo large and ample a Manner as the Law allows in ſimilar Caſes; as if the Condition reſtrain the Legatee from diſpoſing of his Legacy when the Bequeſt to him is *abſolute* (*d*). We muſt obſerve, however, that ſuch a Condition is valid

(*c*) Co. Litt. 206, b. (*d*) Bradley *v.* Peixoto, 3 Veſ. Jun. C. C. 324.

when

when it and the Legacy are not inconſiſtent with each other: ſuppoſe, then, that the Legatee took a Life Intereſt only in the Bequeſt, and after his Deceaſe another Perſon was appointed to take it by executory Deviſe, in ſuch Caſe a Condition to reſtrain the firſt Legatee from alienating his Legacy would be conſiſtent and valid. Upon the ſame Principle, if the Condition be *not general,* but reſtrains the Legatee from diſpoſing of his Legacy *to a particular Perſon,* ſuch a Condition will be good, although the Legatee have the abſolute Intereſt in the Legacy (*e*). For in this Caſe the Reſtraint does not preclude the Legatee from alienating his Legacy, but only impoſes Terms upon him which may be equitable and proper.

Conditions termed *illegal* by the civil Law may be further conſidered under two Heads, *viz.* ſuch Conditions *as relate to Teſtaments,* and ſuch Conditions as concern *the Liberty of Marriage.*

First, as to Conditions which relate to Teſtaments.

Conditions which (if permitted) would have a Tendency to infringe upon the Liberty of another Perſon's Diſpoſition, are conſidered by

(*e*) Swinb. Part. 4, Sect. 13, Pages 271 and 273.

the

the civil Law as *captious* and void. Thus if a Legacy were given by *A* to *B*, upon Condition that *B* ſhould leave *A* the like Legacy by his Teſtament, ſuch Condition would not be ſupported (*f*). Firſt, becauſe it is conſidered as inconſiſtent with that Freedom of Will which *B* ought to poſſeſs at the Time of making his Teſtament; and ſecondly, becauſe ſuch a Condition is preſumed to be clothed with Artifice, and inſerted by *A* with a View of obtaining an undue Advantage over *B*. So odious are theſe Conditions to the civil Law, that they were declared void, although inſerted in Teſtaments purely military, or in the Teſtaments of Fathers providing for their Children, or in Teſtaments *ad pias Cauſas*, and the like. If, however, the Condition had no Reference *to the future Act* of the Legatee, but the Terms of the Bequeſt were in Subſtance as follow, *viz.* "I bequeath to *A* 100*l.* *if he has bequeathed to me* a like Sum by his Will," the Condition would be ſupported; inaſmuch as it was apparent that the Condition did not interfere in the leaſt with *A*'s Liberty of Diſpoſition, and therefore the Caſe did not fall within the Law of *captious Bequeſts*.

Another Head of captious Bequeſts, depending upon ſimilar Reaſoning, is, when a Teſtament is ſaid to depend upon the Will or Appoint-

(*f*) Swinb. eadem Pars, Sect. 11, Page 262.

ment

ment of another Perſon. Therefore, if *C* bequeathed a Legacy of 50*l.* to *A*, *if B will*, or *to ſuch Perſon as A ſhall appoint* (*g*), the Legacies would be void by the civil Law. The firſt Caſe ſuppoſed would be adjudged ſo for this Reaſon, *viz.* that the ancient Legiſlators having conſidered, that if Teſtators were permitted to refer their Teſtaments to the Wills of other Perſons for Effect, it would open a Spring for Fraud, by putting it into the Power of the Perſon depended upon to diſappoint the Perſon intended to be benefited by the Teſtator. The ſecond Caſe propoſed would be adjudged void, becauſe Teſtators are not inveſted with the Power to refer the Subſtance of their Wills to thoſe of other Perſons, the Power of Diſpoſition being conſidered as annexed to the *Perſon* of the Teſtator, and incapable of Delegation, except in the particular Caſes mentioned in the Paſſages referred to in Swinburne.

Such being the *Arbitrium* of the civil Law concerning Bequeſts which it terms *captious*, it may be aſked, whether Courts of Equity have adopted its Reaſoning in ſimilar Caſes? With Regard to the firſt Claſs of theſe Bequeſts, I have been able to find no Caſe wherein theſe Courts have been called upon to decide the Queſtion. The Reaſons given by the civil Law

(*g*) Eadem Pars & Sect. Page 263.

for

for rejecting them are not without Policy and Wiſdom, and are therefore entitled to Reſpect. The Reaſon (ſays Swinburne, referring to Authorities) why theſe Bequeſts are called captious is, " becauſe the Teſtator impoſing the Condition, endeavours to *catch* or intrap the Legatee, by inducing him to give ſuch Teſtator a Legacy in Caſe the Legatee die firſt; by which Means alſo the Liberty of bequeathing, which the Legatee ought to enjoy, is deſtroyed. And as in Marriages the ſame ought to be free, not only from the Fear of incurring Loſs, but alſo from the Apprehenſion of not obtaining Gain, ſo in Teſtaments the ſame ought to be made with all Freedom, not only diveſted from the Fear of incurring Loſs, but alſo without any Proſpect of Gain or Reward." But, according to the Law of England, every Perſon has the Power of diſpoſing of his Property as he chuſes, provided his Will be not contrary to legal Policy—and Fraud is never preſumed without Proof. Beſides, no ſolid Objection ariſes to qualify that Power in Caſes where two Perſons are deſirous, by their Teſtaments, to create a contingent Benefit in Favour of him who ſhall happen to ſurvive the other, when no Deceit has been practiſed by either Party (*h*). Theſe Conſiderations, joined with the Liberality of Conſtruction which prevails in Courts of Equity in Support of Bequeſts,

(*h*) Hinckley *v.* Simmons, 4 Veſ. Jun. 160.

queſts, tend to favour the Concluſion, that ſuch Bequeſts would be maintained. With Regard to the ſecond Claſs of captious Bequeſts, it ſhould ſeem that *A*'s Legacy would immediately veſt upon *B*'s ſignifying his Aſſent: and nothing is more frequent in Practice than Diſpoſitions in Truſt for *A* for Life, with a Limitation over after his Death, for the Benefit *of ſuch Perſons as A ſhould appoint*, the Validity of which Limitation has never been queſtioned (*i*).

Legacies given to Perſons upon Condition not to diſpute the Validity of Wills or Teſtaments, are not conſidered as valid, but *in Terrorem only;* ſo that if there exiſt a *probabilis Cauſa litigandi*, an Endeavour to ſet them aſide will be no Forfeiture, although the Legatee ſhould fail in the Attempt; as appears from the Caſes of (*k*) Powel *v.* Morgan, (*l*) Morris *v.* Burrougs, and (*m*) Lloyd *v.* Spillet. But if the Legacy to which ſuch Conditions are annexed *be limited over* upon a Breach of them, the Non-Obſervance of the Conditions will create a Forfeiture; and for this Reaſon, becauſe immediately upon a Breach of the Condition, an Intereſt in the Legacy ſprings up, and veſts in a third Perſon, *viz.* in the Perſon to whom it was limited over;

(*i*) 3 Brown C. C. 395, in Notes. (*k*) 2 Vern. 90. (*l*) 1 Atk. 404. (*m*) 3 P. Will. 344. 1 Brown C. C. 168.

therefore a Court of Equity cannot, without manifeſt Injuſtice, deprive ſuch Perſon of his legal Right. To this Purpoſe is the Caſe of (*n*) Cleaver *v.* Spurling.

SECOND, Conditions which relate to the Liberty of Marriage.

The civil Law has been very jealous of all Conditions annexed to Legacies which impoſed Reſtraints upon Marriage, as being prejudicial to Society, inaſmuch as they hinder the Propagation of the Species (*o*). Courts of Equity having (as before mentioned) a concurrent Juriſdictionwith the eccleſiaſtical Courts, in perſonal Bequeſts, the former have, in ſome Inſtances relating to this Subject, been biaſſed by the Determinations of the latter, for the Purpoſe of preſerving an Uniformity of Deciſion in both Courts. It is therefore a general Rule, that Conditions in Reſtraint of Marriage are void; ſo that Legacies given upon Condition *not to marry generally*, or *not to marry without the Conſent of other Perſons*, will be conſidered as abſolute Legacies diſcharged from ſuch Conditions, and *that* whether the Conditions be *precedent* or *ſubſequent*; (*p*) Reyniſh *v.* Martin.

(*n*) 2 P. Will. 526. (*o*) Swinb. Part 4, Sect. 12, Page 266. Dig. Lib. 35, Tit. 1. de Condition. & Demonſtrat. Lex 22. (*p*) 3 At. 330. 1 Wilſ. 130, S. C. 3 Atk. 507, 365.

But

But in all Caſes where Marriage with Conſent is required, the Marriage muſt take place (although without Conſent) before the Legatee can be intitled to his Legacy; and to this Effect are the Caſes of (*q*) Atkins *v.* Hiccocks, and (*r*) Elton *v.* Elton.

Although Conditions which reſtrain Marriage *generally* are void, yet Conditions reſtraining Marriages to *Time*, *Place*, or *Perſons* are valid, as not to marry *before* 21; not to marry *at York*, not to marry a *particular Perſon*, or to marry a *particular Woman*, if of good Character (*s*).

A Legacy from an Huſband to his Wife is alſo conſidered as an Exception to the general Rule, in Conſequence of the particular Intereſt a Huſband is ſuppoſed to have in his Wife's continuing a Widow; therefore, if a Bequeſt were made by a Man to his Wife, *if ſhe ſhould continue his Widow*, or *ſo long as ſhe ſhould continue his Widow*, the Condition would be valid (*t*).

The Condition of Marriage with the Conſent of Parents or Truſtees is generally confined *to*

(*q*) 1 Atk. 500. (*r*) 3 Atk. 504. (*s*) Swinb. Part 4. Sect. 12. pages 267, 268. 4 Bro. P. C. 194. 1 Vern. 20. (*t*) Godolph. Oroph. Leg. 45. Swinb. Part 4. Sect. 12. pages 267, 268.

the Time of the Legacies veſting, ſo that, if there were *double Periods* mentioned in the Teſtament for Payment, *viz. at* 21, *or Marriage*; if the Legatee attained 21, the Condition requiring Marriage with Conſent would be defeated, conſequently a ſubſequent Marriage without Conſent would create no Forfeiture. In Support of this Propoſition vide the Caſes of (*u*) Pullen *v.* Ready, and (*v*) Knapp *v.* Noyes.

So far have Courts of Equity gone Hand in Hand with the Eccleſiaſtical; but the former have rejected the Application of the Rule, *when the Legacy is given over* upon Non-compliance with the Condition, although the civil Law has admitted of no ſuch Exception; and to this Effect are the Caſes of (*w*) Stratton *v.* Grymes, (*a*) Aſton *v.* Aſton, (*b*) Chauncy *v.* Graydon, (*c*) Hemmings, *v.* Munkley, and (*d*) Scott *v.* Tyler.

There is a Caſe, indeed, determined by Mr. Juſtice Parker, which ſeems to contradict the Doctrine laſt noticed.—The Caſe was to the following Effect:— (*e*) *A* bequeathed to his Daughter *B* 200l. payable at 21 or Marriage, *if ſhe married with the Conſent of his Executors*;

(*u*) 2 Atk. 588. (*v*) Ambl. 662. (*w*) 2 Vern. 357. (*a*) Ibid. 452. (*b*) 2 Atk. 616. (*c*) 1 Bro. C. C. 303. (*d*) 2 Bro. C. C. 431. (*e*) Underwood *v.* Morris. 2 Atk. 184.

and,

and, after giving ſeveral Legacies to his other Children, declared, that if *either of the Legatees died before their Legacies became payable*, ſuch Legacies ſhould be divided *between the Survivors of his Brothers and Siſters.*—*B* married at 15 without the Aſſent of the Executors. The Queſtion was, whether the Marriage was a Forfeiture of the Legacy? And Mr. Juſtice Parker determined that it was not, upon the Idea that the Condition was *in Terrorem only*; and he therefore decreed Payment of the Legacy to *B*'s Repreſentative.

It is obvious that this Caſe is clearly within the Reaſon of that Claſs of Caſes in which Courts of Equity have not adopted the above Rule of the Civil Law, and it ſtands in direct Oppoſition to the ſeveral Caſes laſt referred to. This Caſe, however, ſeems to be of no Authority, and it was ſo conſidered by Lord Loughborough in the Caſe of (*f*) Hemming's *v.* Munkley, and by Lord Thurlow in that of (*g*) Scott *v.* Tyler.

There is a Caſe in which a Condition in Reſtraint of Marriage has been conſidered obligatory, although there was no Limitation over upon a Breach of it—and the Caſe was as follows:— (*h*) *A* by his Will bequeathed an

(*f*) 1 Bro. C. C. 303. (*g*) 2 Bro. C. C. 431. (*h*) Gillet *v.* Wray 1 P. Will. 284.

Annuity of 10l. to his Grand-daughter for Life, and afterwards by a Codicil declared, *that if his Grand-daughter ſhould marry with the good Liking of his Truſtees*, ſhe ſhould have 150l. in lieu of the Annuity. The Grand-daughter married without the Conſent of the Truſtees, and Lord Cowper determined that ſhe was not intitled to receive the Legacy of 150l. obſerving, that there was a Proviſion made either Way; and where the Proviſion for the Child is *in the alternative*, and there is a Condition *precedent* to the Gift of the Portion, viz. *if ſhe marry with Conſent*, &c. and that is not performed, and the Child is ſtill provided for, though not with the greater Portion, Equity in that Caſe would not relieve.

With due Deference, however, to the Memory of the Perſon who made the above Deciſion, the Caſe at preſent appears to be of queſtionable Authority. It is admitted that the Condition is *precedent*; but it ſeems ſettled by the later Caſe of (*i*) Reyniſh *v.* Martin, that in *pecuniary Legacies* it is immaterial with Reſpect to the Application of the general Rule above ſtated, whether the Condition of Marriage with Conſent be *precedent or ſubſequent*, if the Marriage be ſo-

(*i*) 3 Atk. 330.

lem-

lemnized (*k*). And with Regard to the Teſtator's Intention inferred from the Act of Subſtitution, ſuch Intent does not appear to have been conſidered in the ſmalleſt Degree by the civil Law in framing the Rule, the Baſis of it being laid upon the broad Policy of encouraging Marriages. We may alſo obſerve, that the Reaſon why Courts of Equity refuſe to apply the Rule in Caſes where there is a Limitation over of the Bequeſt, is not from any preſumed Intention of Teſtators in favour of the Legatee, but from the Circumſtance *of a third Perſon's Right intervening*, which having become veſted upon the Condition broken, there is no Equity to diveſt ſuch Perſon of his Intereſt. There are two Caſes which appear to favour the above Obſervations, *viz.* (*l*) Garret *v.* Pritty, and (*m*) Wheeler *v.* Bingham. Although theſe two Caſes may be of no Authority in Regard to the Conſideration, whether the Deviſee of a Reſidue be or not ſuch a Legatee over of the particular Legacy as to prevent the Rule from attaching, they, nevertheleſs, ſeem ſufficient to ſhew the Opinion of the Court to this Effect—that where there is no Bequeſt over of the Legacy, *the mere Subſtitution of one Legacy for another, or the Abridgment of a larger one*, upon Non-performance of the

(*k*) Reeves *v.* Herne. Vin. Abr. Tit. Condition (z. d.) pl. 41. (*l*) 2 Vern. 293. (*m*) 3 Atk. 364.

Condition, would not prevent the Rule's attaching, whether the Condition was *precedent* or *ſubſequent*.—See alſo the Caſe of (*n*) Hicks *v.* Pendarvis.

It was formerly the Law of Courts of Equity, as may be collected from the Caſes of Garret *v.* Pritty, Wheeler *v.* Bingham, and (*o*) Semphill *v.* Bailey, that unleſs the *particular Legacy* was limited over upon Breach of the Condition, the Condition would be conſidered as *in Terrorem* only, ſo that the Diſpoſition of a *Reſidue* was not ſufficient to prevent the Operation of the Rule, but the Law of the Court has as it ſeems changed in this Reſpect, as appears from the Caſes of (*p*) Amos *v.* Horner, and (*q*) Scott *v.* Tyler.

In Caſes where Legacies are charged upon *real Eſtate*, or are directed to be paid out of that Fund in the *firſt Inſtance*, as the eccleſiaſtical Court has no Juriſdiction in ſuch Caſes, Courts of Equity have conſidered themſelves as diſentangled from the eccleſiaſtical Rules, and have therefore adopted thoſe of the common Law, and given full Effect to Conditions in Reſtraint of Marriage, when not improperly impoſed, without making any Difference,

(*n*) 2 Freem. 41. (*o*) Ch. Pre. 562. (*p*) 1. Eq. Ca. Ab. 112. pl. 9. (*q*) 2 Bro. C. C. 431. 463.

whether

whether there is a Limitation over on Breach of the Condition or not. See the Caſe of (*r*) Harvey *v.* Aſton. In the Caſe of (*s*) Reyniſh *v.* Martin, the Legacy was a Charge upon the *real*, on Deficiency of the perſonal, Eſtate. Lord Hardwicke therefore conſidered what Effect the Condition of marrying without Conſent would have upon ſuch a Bequeſt if the perſonal Fund proved inſufficient to pay it. This Conſideration he divided into two Parts—firſt, as if the Legacy was an *original* Charge upon the Land; and ſecondly, as if it were but an *auxiliary* Charge upon that Eſtate only. In the firſt Caſe his Lordſhip ſaid, that, as the Legatee had not complied with the Condition, ſhe could make no Title to the Legacy; for, that being a *Charge* upon the *real* Fund, followed the Rules of the *Common Law*, by which the Condition was good; and the Condition being broken, as *that* Law would not, neither could Equity (*t*) give any Aſſiſtance. And in the ſecond Caſe, if there was no Occaſion to reſort to the real Eſtate, the Legacy would be conſidered as *pecuniary* merely, and the Legatee, of Conſequence, intitled to it by the civil or cannon Law; but that, if the perſonal Fund failed, and Recourſe was to be

(*r*) 1 Atk. 361. (*s*) 3 Atk. 330. 1 Mod. 300.
(*t*) Ibid. 308, 9.

had

had to the real Eſtate for Payment, the common Law would ſtep in again and defeat the Legacy.

In Deeds, &c. which are preſumed to be made and entered into with all due Care and Circumſpection, the Law has ordained certain appropriate Words (*u*) to raiſe Conditions, without which it will not conſider a Condition as properly created; but, in Wills and Teſtaments, other Words are ſufficient for the Purpoſe, on Account of the Indulgence the ſame Law allows to that Imbecility of Body and Mind with which it conſiders Teſtators to be afflicted at the Time thoſe Inſtruments are made; therefore in all Caſes where the Intention can be collected that the Bequeſt was meant to be *conditional*, that Intent, if legal, will be effectuated by whatever Words expreſſed.

(*u*) Swinb. Part 4. Sect. 5. pages 236, 237. Co. Litt. 204. a.

Per-

Performance of Conditions.

WITH Reſpect to the Performance of Conditions, the civil Law has required a ſtrict Performance in general Caſes; thus, if 100l. were given to *B*, if he paid *C* 50l. within a certain Period, and *C* died before that Time, Payment to *C*'s Executors upon the Day would not be ſufficient (*v*). It ſeems, however, that the common Law would not require ſuch a literal Performance of the Condition, but permit the Execution of it *cy pres*, viz. by allowing Payment of the 50l. to *C*'s Executors to be a good Performance of it (*w*). Upon a ſimilar Principle with that of *cy pres Performance*, the civil Law has admitted of a very extenſive Exception to its general Doctrine of ſtrict Performance, *viz.* in all Caſes where it is apparent that Teſtators paid more Reſpect to the *End or Execution* of the Condition, than to the *Mean* preſcribed for the Performance of it (*x*). Therefore, if *A* bequeathed a Legacy to *B*, in Caſe he erected a Monument for *A*, *within three Days* after *A*'s Death, although *B* ſhould not *literally* comply with the Condition, yet he would be intitled to his Legacy upon Performance of it, within a reaſonable

(*v*) Swinb, Part 4. Sect. 7. page 245. (*w*) Co. Litt. 205, b.
(*x*) Swinb. eadem Pars. & Sect. & page.

Time

Time, as the Erection of the Monument would be conſidered as of the Subſtance of the Legacy, and the Time appointed for Building of it but a Mean to expedite the Buſineſs (*a*). We muſt obſerve, however, that the Time appointed for Performance of Conditions is *material*, and muſt not be exceeded without the Concurrence of the Perſon to whom the Condition is to be performed (*b*). And if the Hour of the Day, upon which the Condition is to be executed be not aſcertained, yet Attendance during ſuch Period of that Day as may be convenient to perform the Buſineſs *before Sun-ſet*, and with an Intent to perform the Condition, will be ſufficient (*c*). But if the Perſon in whoſe Favour the Condition was made, conſent to accept the Performance of it in a Way different from that preſcribed, he will not be permitted to take Advantage of the literal Non-execution of the Condition, for it was his own Fault to agree to a different Performance; and it is a Maxim that *Volenti non fit Injuria* (*d*).

When no Place is appointed for Performance of the Condition, when the Condition relates to Money, or other perſonal or tranſitory Thing, the Perſon to execute it muſt find out *B*, to whom it is to be performed,

(*a*) Swinb. Part 4. Sect. 6. page 242. (*b*) Litt. Sect. 337. (*c*) Co. Litt. 202, a. (*d*) Co. Litt. 212. b. Swinb. Part 4, Sect. 7, page 245.

if

if he be *infra Regnum Angliæ*; but if *B* be abroad, the Condition will be ſaved, although no Tender or Payment of the Money be made to him; (*e*) and although the Place be named, yet if the Legatee have the whole Period of his Life to perform it, he muſt give Notice to the Perſon to whom the Condition is to be performed of the Time when he intends to execute it, otherwiſe ſuch Perſon would be under the Neceſſity of attending always at the Place appointed in Expectancy, which would be unreaſonable (*f*).

There are certain Species of Conditions which may be conſidered as performed even in the Lifetime of the Perſons impoſing them; but they are ſuch as from their Nature do not admit of Repetition, and the Performance whereof Teſtators are preſumed to have been ignorant of at the Time they made their Teſtaments (*g*). Thus, if a Legacy were given to *B*, if he ſhould remit a Debt due to him from *C*, which Debt had been already remitted by *B*, ſuch Remittal, although before the Date of the Teſtament, will be conſidered as a Performance of the Condition. And again, if a Legacy were given to *B*, if the Teſtator's Ship ſhould

(*e*) Co. Litt. 210. b. (*f*) Co. Litt. 211. a. (*g*) Swinb. Part 4. Sect. 14. page 275.

return

return from Venice, which Veſſel was then returned, the Bequeſt would nevertheleſs be good.

A Legatee may be ſaid to have Time during Life to perform a Condition when no Period is fixed for the Purpoſe, as if the Bequeſt were made to *A*, if he ſhould pay to the Poor of *B* 10l. and the like: the civil Law makes a Diſtinction between an Executor and a Legatee, allowing the former the Option of performing the Condition at any Period during Life, but denying that Privilege to the latter; that Law conſidering the Conſequences which attach to the Acceptance of an Executorſhip of ſo great a Moment as to induce it to ſhew this Favour to Executors (*h*); but it ſhould ſeem that Legatees would be allowed the ſame Privilege by Courts of Equity, if no Requeſt was made by the Perſons intereſted to accelerate Payment, eſpecially as they relieve againſt Forfeitures (*i*); and no Default could appear in the Legatee before Refuſal of Compliance, which could only be upon a *previous Requeſt*.

Sometimes a Condition conſiſts of a Variety of Parts, which are either *copulative* or *disjunctive*; the *former* muſt be executed in all Re-

(*h*) Swinb. eadem Pars. & Sect. pages 277, 278. (*i*) Co. Litt. 208. a and b. Francis's Maxims of Equity. page 44. 1 Bro. C. C. 168.

ſpects,

ſpects, or elſe the Condition will not be performed, except ſome of the component Members become impoſſible, and then the Law will divide them. But Obſervance of any Part of the *latter* will, in general, be ſufficient to ſave the Condition. See the Diſtinctions taken in the Caſes and Authorities referred to (*k*).

It is a Rule in Equity to relieve againſt Forfeitures occaſioned by Non-performance of Conditions which *lie in Compenſation* (*l*). But as Conditions requiring Marriage with Aſſent, are, from their Nature, incapable of any Compenſation when broken, the Court of Chancery has never given Relief againſt them. We muſt notice, however, that in thoſe Caſes where the Conditions laſt alluded to are *ſubſequent*, and *afterwards become impoſſible*, as by the Death of the Perſons whoſe Conſent is required (*m*), although there be a Limitation over of the Legacies, upon a Breach of ſuch Conditions, yet the Performance of them will be no Forfeiture; Conditions which diveſt Eſtates or Intereſts, being always conſtrued ſtrictly. See the Caſes of (*n*) Peyton *v.* Bury, (*o*) Graydon *v.* Hicks, (*p*) Jones *v.* Suffolk, and (*q*) Mercer *v.* Hall.

(*k*) Co. Litt. 225, a. Owen, 52. Roll. Abr. 444. Cro. Eliz. 398. 864. 2 Mod. 200. 2 Atk. 588. Ambl. 662. (*l*) Kaims's Princ. of Eq. 51, 81. ed. 1760. (*m*) Co. Litt. 206, a. (*n*) 2 P. Will. 626. (*o*) 2 Atk. 16. (*p*) 1 Bro. C. C. 528. (*q*) 4 Bro. C. C. 326.

Upon the Principle that Courts of Equity look upon Conditions in Reſtraint of Marriage in an unfavourable Point of View, they have not been ſtrict in requiring ſuch Conditions to be complied with in every minute Particular; for, if the Conſent be given in *Subſtance*, it will be ſufficient. To this Effect Mr. Juſtice Comyns expreſſed himſelf in the Caſe of (*r*) Harvey *v.* Aſton, *viz.* that where the Condition was performed to a *reaſonable Intent*, the Court had diſpenſed with the *Want of Circumſtances*, as when the *major Part* of the Truſtees conſented, or when *an implied* Aſſent was given. In Support of theſe Propoſitions, are the Caſes of (*s*) Wiſeman *v.* Foſter, (*t*) Meſgret, *v.* Meſgret, (*u*) Daley *v.* Deſbouverie, and (*v*) Mercer, *v.* Hall.

For the like Reaſons, if there be improper Conduct in the Perſon whoſe Aſſent is required, as if he permit and encourage the Courtſhip *in the firſt Inſtance*, and afterwards, without ſufficient Cauſe, *refuſe to conſent to the Marriage;* in theſe Inſtances the firſt Acts will be conſidered to amount to ſuch an *implied* Conſent, as to prevent a Forfeiture upon Marriage without any farther Aſſent; as appears

(*r*) 1 Atk. 375. (*s*) 2 Ch. Rep. 13. (*t*) 2 Vern. 580. (*u*) 2 Atk. 261. (*v*) 4 Bro. C. C. 326.

from

from the Caſes of (*a*) Campbell *v.* Netterville, cited in the Caſe of Berkley *v.* Rider, and (*b*) Strange *v.* Smith.

It ſeems that in general when the Aſſent of Executors or Truſtees is neceſſary to the Marriage of Legatees, it muſt be given *before*, or *at the Time* of the Marriages, *and not afterwards*, for a ſubſequent Conſent can never have the Effect of diveſting an Intereſt become veſted in other Perſons upon a Breach of ſuch Conditions, without expreſs Words for the Purpoſe. Thus in the Caſe of (*c*) Reyniſh *v.* Martin, although the Daughter married without the Conſent of the Truſtees, *they afterwards declared their Aſſent in Writing;* but Lord Hardwicke obſerved, in delivering his Opinion, that as the Daughter had married without having firſt obtained the Conſent of the Truſtees, their *ſubſequent Approbation* of the Marriage was immaterial, becauſe ſuch Conſent or Appprobation could not amount to Performance of the Condition, or diſpenſe with a Breach of it; but in Caſes where the Terms, in which ſuch Conditions are framed, are large enough to admit of *ſubſequent Conſent* as ſufficient to ſave the Conditions: the Court has given full Effect to ſuch Terms, and decided in Favour of ſuch

(*a*) 2 Veſ. 534. (*b*) Ambl. 263. (*c*) 3 Atk. 330.

after-Aſſent. Therefore, if the Condition be framed in the alternative, *viz.* requiring the Conſent or *Approbation* of *B* or *C*, if *B* or *C* give their Aſſent after the Marriage, the Forfeiture will be ſaved by it. See the Caſe of (*e*) Burleton *v.* Humfrey.

As to giving Notice of Conditions.

It ſeems that Legatees muſt, at their Peril, take notice of Conditions annexed to Legacies, as the Executors are under no Obligation to give them Notice of ſuch Conditions, unleſs by ſpecial Direction; from whence it follows, that it will not be a ſufficient Excuſe to Legatees (to ſave a Forfeiture) to alledge that they had no Notice of the Conditions upon which their Legacies were given; as appears from the Caſe of (*f*) Chauncy *v.* Graydon. But with Regard to real Eſtate, a Diſtinction has been taken between an *Heir* at Law and a *Stranger;* and to this Effect, that Notice is neceſſary to be given to the Heir of the Condition before a Forefeiture can attach for a Breach of it; and that no ſuch Notice is required to be given to the Stranger. The Reaſoning is this—becauſe the *former* has a Title paramount to the Inſtrument, *viz.* the

(*e*) Ambl. 256. (*f*) 2 Atk. 616.

Deſcent,

Deſcent, and is ſuppoſed to enter and claim under the latter Title; therefore, *as the Deviſe is not neceſſary to give the Heir a Title*, he will not be preſumed to know any Thing of it, or of the Condition before Notice is given. But the *latter* has no Title, except under the Inſtrument which impoſes the Condition; wherefore he is preſumed to be cognizant as well of the Condition as of the Bequeſt (*g*).

(*g*) 1 Mod. 86. 300. 3 Mod. 28. Skin. 125. Ambl. 259.

OF INTEREST UPON LEGACIES.

IT is a general Rule, that where no Time is appointed for the Payment of Legacies, they are to be raiſed and ſatisfied out of the Teſtator's Aſſets, at the Expiration of one Year next after his Deceaſe; if therefore the Executor omit to pay them at that Time, the Legatees will be entitled to Intereſt from that Period. (*a*)

But in particular Caſes, where the Teſtator's Intention appears in Favour of the Conſtruction, the Court of Chancery will direct Intereſt to be paid *from the Teſtator's Death.* (*b*) Thus *A*, by Codicil, directed certain Truſtees, named in his Will, (to whom he had bequeathed 4000l. to be applied in ſuch Manner as he ſhould appoint) to apply the 4000l. to the Uſes of a Boy, named *Michael*, then five Years old, and living with

(*a*) 2 Atk. 109. 2 P. Will. 26. 1 Veſ. Jun. 367. (*b*) Beckford *v.* Tobin. 1 Veſ. 308.

B, and

B, and to pay the Expences of his *Maintenance and Education out of the Intereſt of that Sum.* Upon a Queſtion from what Period Intereſt ſhould be paid upon the Legacy, Lord Hardwicke determined, that the Legacy ſhould carry Intereſt from the Teſtator's Death, obſerving, that as no Time was appointed for the Commencement of the Legatee's Maintenance and Education, they were to be conſidered as intended to commence from the Death of the Teſtator, and to continue throughout; and that unleſs the Court made ſuch a Conſtruction in Favour of immediate Intereſt, the Child, in Caſe he died within the Year, would have no Maintenance; and as no Perſon could in ſuch a Caſe apply any Part of the Intereſt for the Legatee's Benefit, whoever ſhould maintain him would have loſt their Money.

Intereſt upon ſpecific Legacies are to be computed *from the Death of the Teſtator*, for they being ſevered from the Bulk of his Eſtate, are conſidered as ſpecifically appropriated with their Increaſe and Emoluments for the Benefit of the Legatees. Phillips *v.* Carey, mentioned in the Caſes of (*c*) Lawſon *v.* Stitch, (*d*) Heath *v.* Perry, and (*e*) Sleech *v.* Thorington.

(*c*) 1 Atk. 508. (*d*) 3. Atk. 104. (*e*) 2 Veſ. 561.

When a Period is fixed for the Payment of Legacies, *as when the Legatees ſhall attain* 21, *or at ſome other definite Time*, the Legatees will not in general be intitled to Intereſt upon their Legacies before thoſe Periods, and for this Reaſon--becauſe Intereſt can be due only where there is Delay in Payment of the Principal. See the Caſes of (*f*) Hearle *v.* Greenback, (*g*) Cricket *v.* Dolby, and the ſeveral other Caſes referred to in the Notes.

The Caſe of *Children*, however, is an Exception to the Rule, and the Court of Chancery will allow Intereſt to be computed upon their Legacies, from the Death of their Parents, conſidering Parents to be under a natural Obligation to provide as well a preſent as a future Maintenance for their Children; to this Purpoſe are the Caſes of (*h*) Green *v.* Belchier, (*i*) Carey *v.* Aſkew, and the other Caſes referred to in the Notes.

In Cricket *v.* Dolby, before referred to, the Maſter of the Rolls is reported to have ſaid, that a *Grandchild* was always conſidered *the ſame as a Child*, within the View of the above Exception;

(*f*) 3 Atk. 697. 716. (*g*) 3 Veſ. Jun. 10. Ch. Pre. 337. 2 Atk. 108. 3 Atk. 432, 438. 4 Veſ. Jun. 1. (*h*) 1 Atk. 505. (*i*) 2 Bro. C. C. 59. Ch. Pre. 367. 1 Veſ. 310. 2 P. Will. 21. 3 Atk. 102. 438. 1 Eq. Ca. Abr. 301.

but,

but, with due Deference to ſuch a *Dictum*, it appears that a Diſtinction has been made between Children and Grandchildren upon this Subject, the Court of Chancery having in ſeveral Inſtances refuſed to allow the latter Intereſt upon their Legacies before the Time arrived which was appointed for their Payment. See the Caſes of (*k*) Haughton *v.* Harriſon, (*l*) Butler *v.* Butler, and (*m*) Deſcrampes *v.* Tomkins; cited in a Note to the Caſe of Shaw *v.* Cunliffe.

If immediate Intereſt upon Legacies to Children be given for their Maintenance, it is the general Rule of the Court of Chancery not to permit ſuch Intereſt to be applied for that Purpoſe, if the Parent of the Legatee, who is under a natural Obligation to provide for him, be of ſufficient Ability; ſo that the Intereſt will accumulate for the Child's Benefit, until the Principal become payable. To this Effect are the Caſes of (*n*) Butler *v.* Freeman, (*o*) Darley *v.* Darley, (*p*) Hughes *v.* Hughes, and (*q*) Pulsford *v.* Hunter. But it having been lately experienced, that a rigid Adherence to the Rule would be attended with Inconvenience and Injuſtice to the other Branches of the Family, the Court has thought proper to admit of Exceptions

(*k*) 2 Atk. 328. (*l*) 3 Atk. 58. (*m*) 4 Bro. C. C. 149. (*n*) 3 Atk. 58. (*o*) *ibid.* 399. (*p*) 1 Bro. C. C. 386. (*q*) 3 Bro. C. C. 416.

to the Rule. Thus if there were a Number of Children unprovided for, and one of them happened to become amply provided for by the Bequeſt of a conſiderable Legacy, in this Caſe, although the Parent might be able to maintain all his Family, yet it is obvious, that the Legatee, who has no Occaſion for his Support, would deprive the other Children of ſo much of their Parent's Property as might be applied towards his, the Legatee's Maintenance, which (from their being unprovided for) would be better appropriated for their Benefit. It ſeems, therefore, that in ſuch and the like Caſes, an Allowance would be made to the Parent out of the Produce of the Child's Legacy, for his Maintenance and Support. See the Caſe of (*r*) Hoſte *v.* Pratt.

And in Inſtances where the Fund ſettled does not operate as a Bounty to the Children, but the Maintenance provided for them is *Part of the Execution of a Truſt contained in a Contract, as by Settlement*, to which the Father is a Party, the Court (notwithſtanding the Ability of the Parent to maintain his Children) will allow him the Expence of their Maintenance out of the Produce of their Fortune. (*s*) Mundy *v.* Lord Howe.

(*r*) 3 Veſ. Jun. 730. (*s*) 4 Bro. Ch. Ca. 223.

I have

I have not been able to find any Caſe in which it has been decided, that a natural Child was intitled to immediate Intereſt upon a Legacy payable at a future Time, when ſuch Legacy was given to him by his reputed Father; but I have met with two contradictory *Dicta* upon the Subject, by two high Authorities, *viz.* by Lord Hardwicke, in the Caſe of (*t*) Beckford *v.* Tobin, and the Maſter of the Rolls, in (*u*) Cricket *v.* Dolby. The *former*, after ſtating the Indulgence ſhewn by the Court to legitimate Children, by allowing them Intereſt upon their Legacies for Maintenance, obſerved---"That the Court "had not ſhewn this Indulgence to natural "Children, for two Reaſons; firſt, from the Rule "of Law, which conſiders a natural Child as no "Relation, having no civil Blood; and ſecondly, "becauſe it was not fit for a Court of Juſtice to "give the ſame Countenance to ſuch Children as "to legitimate Children; and to diſcountenance "Practices of that Kind, the Court had taken "them to be out of all ſuch Proviſions." The *latter*, on the contrary, is reported to have ſaid, in the Caſe laſt referred to, "That if a Father, "by Will, give his natural Child a Portion, "payable at 21, the Court will not ſay that it "was intended to ſtarve in the mean Time, but "will allow Maintenance." Theſe two Opinions or *Dicta*, militating ſo directly againſt each other,

(*t*) 1 Veſ. 308. (*u*) 3 Veſ. Jun. 10.

a few

a few Obſervations upon them may not be unacceptable to the Reader: with Reſpect then to the Reaſons aſſigned by Lord Hardwicke, for the Court's Refuſal to allow Maintenance to a natural Child out of the Produce of a Legacy, payable at a future Period, they appear to be founded upon the ſame Principles which give Birth to the ſeveral other Diſabilities to which natural Children are liable by the Laws of this Realm, *viz.* the Encouragement of Marriage, and the Diſcountenance of illicit Commerce between the Sexes. Coinciding, therefore, with the Opinion of Lord Hardwicke, I conceive the Queſtion not to be, what was the *Intention* of the reputed Father, in bequeathing the Legacy to his natural Child, but what the *Policy of the Law* allows to ſuch a Child *comparatively* with legitimate Children? That the Court has, in Favour of Marriage, conſtantly kept up a Diſtinction between each of theſe Claſſes of Children, is obvious from the many Caſes which have occurred upon the Subject; and I conceive that the ſame Principle which induces the Court to refuſe ſupplying a defective Surrender for a natural Child, is of equal Weight, when applied to the Queſtion of allowing him *immediate Intereſt* for Maintenance upon a future Legacy. Both Applications muſt be made to the Favour of the Court; but a *natural Child* can have no ſuch Claim; and I conceive, that, however diſtreſſing its Situation may be, the Court would not

not relax its Rules, and give Effect to a Deviſe in Favour of the Child, which would be otherwiſe void for Want of a previous Surrender. In both Caſes the natural Child muſt be conſidered as *nullius Filius*, and could not be looked upon *as a Child* in any Court of Juſtice; *the very Conſideration*, therefore, which induces the Court of Chancery to allow *immediate Intereſt* to legitimate Children on future Legacies, does not exiſt in the Caſe of natural Children, as their Relationſhip to their reputed Father, and the Conſequences deducible from it, are not, as to this Queſtion, cognizable in a Court of Juſtice.

It was reſolved, in the Caſe of (*x*) Maxwell *v.* Wettenhall, that if a Perſon give a Legacy charged upon Land, which yields Rents and Profits, and there is no Time of Payment mentioned in the Will, the Legacy ſhall carry Intereſt from the Teſtator's Death, becauſe the Land yields Profits from that Time. That if a Legacy were charged upon a *dry Reverſion*, it ſhould carry Intereſt only from the Expiration of a Year next after the Deceaſe of the Teſtator, a Year being a convenient Time for Sale (*y*). And that if a Legacy were brought into Court, and the Legatee had Notice of it, ſo that it was his Fault not to pray to take the

(*x*) 2 P. Will. 26. (*y*) 2 Atk. 108.

Money,

Money, or that the Money might be put out at Intereſt, the Legatee, in ſuch Caſes, ſhould loſe the Intereſt from the Time the Money was brought into Court; but that if the Money was placed out, the Legatee ſhould have the Intereſt which the Legacy yielded. And, moreover, that if a Legacy was given out of a perſonal Eſtate, conſiſting of *Mortgages carrying Intereſt*, or of *Stocks yielding Profits half yearly*, the Legacy ſhould alſo, in that Caſe, carry Intereſt from the Death of the Teſtator.

When a Fund is bequeathed for Life, and afterwards, upon the Death of the Perſon taking the Life Intereſt, the intermediate Intereſt in the Legacy, to a given Period, becomes undiſpoſed of, whether ſuch Legacy be *particular* or *reſiduary*, the intermediate Intereſt will lapſe into the Reſidue, for the Benefit of the Executor, or next of Kin of the original Teſtator, if not bequeathed by him; but if diſpoſed of, then for the Benefit of his reſiduary Legatee. Thus if the Bequeſt was made to *A* for Life, and after *A*'s Death, to the *youngeſt* Child of *B*; *A* died in *B*'s Lifetime; as it is uncertain, during the Life of *B*, which of his Children may be the *youngeſt* at the Period of his Death, it is evident that the Legacy could not veſt upon the Death of *A*, conſequently the Intereſt to ariſe upon the Legacy, from the Death of *A* to that of *B*, is upon the Event which has happened

pened undiſpoſed of, and will lapſe into the Reſidue for the Benefit of the Perſons before mentioned. To this Purpoſe may be adduced, the Caſes of (*z*) Wyndham *v.* Wyndham, and (*a*) Shawe *v.* Cunliffe.

And when the Reſidue is given in ſuch Manner as not to intitle the reſiduary Legatee to the Intereſt intermediate between the Teſtator's Death and the Time appointed for Payment of the reſiduary Fund, as where the Bequeſt of it is made to *A*, *at* 21, the Gift and Time of Payment being blended together, ſuch Intereſt will fall into the Reſidue, to accumulate for the Benefit of the reſiduary Legatee, or for the Executors or next of Kin of the Teſtator, upon the Event of the reſiduary Legatee's Death, before he become intitled to receive his Legacy. See the Caſes of (*b*) Green *v.* Ekins, (*c*) Butler *v.* Butler, (*d*) Trevanion *v.* Vivian, and (*e*) Studholme *v.* Hodgſon.

If a Legacy be given by *immediate Bequeſt*, whether ſuch Legacy be *particular* or *reſiduary*, and there is a Condition to defeat it upon the Legatees dying under 21, or the happening of ſome other Event, with a Limitation over, and the Legatee dies before 21, or before the other

(*z*) 3 Bro. C. C. 58. (*a*) 4 Bro. C. C. 144. (*b*) 2 Atk. 473. (*c*) 3 Atk. 58. (*d*) 2 Veſ. 430. (*e*) 3 P. Will. 299.

Event

Event happens, which, nevertheleſs, does afterwards take Place, yet, as the Legacy was payable *at the End of a Year* after the Teſtator's Death, the Legatee's *Repreſentative*, and not the Legatee over, will be intitled to the Intereſt which accrued during the Legatee's Life, or until the happening of the Event which was to defeat his Legacy. To this Effect are the Caſes of (*f*) Tiſſen *v.* Tiſſen, (*g*) Taylor *v.* Johnſon, and (*h*) Shepherd *v.* Ingram.

But the Court of Chancery has gone further, and determined, that if the Legacy *be not payable at the End of the Year* next after the Teſtator's Death, *but upon the Legatee's arrival at* 21, with a Bequeſt over upon his dying before that Age; yet *his Repreſentative* ſhall be intitled to the Intereſt which became due during his Life. See the Caſes of (*i*) Nicholls *v.* Oſborne, and (*k*) Chaworth *v.* Hooper.

I am not aware of any Principle upon which theſe laſt Caſes have been determined, as conſiſtent with that which has been the foundation of prior Deciſions; it ſeems unqueſtionably ſettled by the Caſes referred to in a former Part of this Chapter, that Intereſt can be only due upon Legacies on Account of Non-payment; and

(*f*) 1 P. Will. 500. (*g*) 2 P. Will. 504. (*h*) Ambl. 448. (*i*) 2 P. Will. 419. (*k*) 1 Bro. C. C. 82.

there-

therefore, that Legacies given *immediately*, but *made payable at a future Day*, although veſted, will not bear Intereſt for the Benefit of the Legatees, before the Time appointed for their Payment. The only Difference between thoſe two Claſſes of Caſes is, that the Legacies in thoſe firſt referred to, are not given over upon the Event of the Legatees Death, before his Legacy becomes payable; and in the latter, that ſuch Event is provided for by a contingent Bequeſt over; but what Difference, on ſound Principle, this Circumſtance can make to alter the Rule relative to the Legatee's Title to Intereſt, does not appear. In both Inſtances, as there is no Forbearance of Principal, *in both Inſtances it* ſhould ſeem that no Intereſt could accrue for the Benefit of the Legatees, before the Times arrived which were appointed for the Payment of the Legacies. It is obvious, however, that the Caſe is different when *no Period is fixed* for Payment of the Legacy, but the Bequeſt is *immediate*, with a Proviſoe, defeating it *upon the happening of a future Event*, and then diſpoſing of it to another Perſon; in ſuch Caſe the Legacy is payable *immediately*, or, at the furtheſt, *at the End of a Year next after the Teſtator's Death;* the Intereſt then following the Principal, the Legatee, who is intitled to the Principal, muſt conſequently be intitled to the Produce of it, until the Event takes Place (if ever) which was to defeat the Bequeſt. As to the Caſe of

(*l*) Acherley *v.* Wheeler, reported by P. Williams, in which Lord Macclesfield allowed Intereſt upon a Legacy or Portion, before it was payable; Lord Hardwicke obſerved, in (*m*) Heath *v.* Perry, that Lord Macclesfield's Decree was made upon the particular Circumſtances of the Caſe, and therefore was an Exception to the general Rule; and with Reſpect to the Caſe of Bourne *v.* Tynte, cited in (*n*) Acherley *v.* Wheeler, his Lordſhip doubted the Authority of Lord Keeper Finch's Decree pronounced in that Cauſe.

The Rule which the Court of Chancery has adopted in Regard to the Rate or Quantum of Intereſt to be allowed upon Legacies, when the Amount of it has not been aſcertained by the Teſtator, and the Legacies have not been paid for a conſiderable Time after they became due, has not been at all Times ſteady and uniform; a Diſtinction has been made when the Legacies were charged upon Lands, and when payable out of the perſonal Eſtate only. The Court in the firſt Caſe has allowed 4l. and in the latter 5l. per Cent. as Intereſt, which appears from the Caſes of (*o*) Moore *v.* Moore, (*p*) Swynſen *v.* Scawen, (*q*) Bryant *v.* Speke, (*r*) Trimleſtown *v.* Colt, and (*s*) Denton v. Shellard.—

(*l*) 1 Vol. 783. (*m*) 3 Atk. 103. (*n*) 1 P. Will. 786. (*o*) 3 Atk. 402. (*p*) 1 Veſ. 99. (*q*) Ibid. 171. (*r*) Ibid. 277. (*s*) 2 Veſ. 239.

But

But the Court has latterly exploded the Diſtinction, and laid the Rule down *generally* to allow no more Intereſt than 4l. per Cent. without making any Difference whether the Legacy is charged upon Lands or on perſonal Eſtate only. And to this Effect Lord Hardwicke laid down the Rule in the Caſes of (*t*) Guillam *v.* Holland, (*u*) Beckford *v.* Tobin, and (*x*) Wood *v.* Briant. In the laſt Caſe his Lordſhip ſaid, that from the Year 1725, (the Time when Lord King came to the Great Seal) the Court never directed more than 4l. per Cent. Intereſt. But that this Aſſertion of Lord Hardwicke cannot be correct, appears from the Caſes before referred to relative to the old Rule of the Court: And in (*y*) Treves *v.* Townſhend, Lord Thurlow lays down the modern Rule as before ſtated, and ſaid that it was not to be varied but under *ſpecial Circumſtances.* In that Caſe the Aſſignee of a Bankrupt having kept Money in his Hands for ſeveral Years, without making a Dividend, his Lordſhip directed him to repay the Money, with *legal Intereſt.* And it appears, from a late Determination of the Maſter of the Rolls, that if the Property bequeathed to the Perſons here as Executors be ſuch as, from its *local Situation,* bears a larger Rate of Intereſt than is allowable in this Country, yet no more of Intereſt

(*t*) 2 Atk. 343. (*u*) 1 Veſ. 311. (*x*) 2 Atk. 523. (*y*) 1 Bro. C. C. 384.

than 4l. per Cent. will be allowed by the Court, unleſs under ſpecial Circumſtances, becauſe the Funds are ſuppoſed to come into the Hands of the Executors, within a Year after the Teſtator's Death, and that they can make no more of them, than Intereſt after that Rate. See the Caſe of (z) Malcom *v.* Martin, and the Maſter of the Rolls's Obſervations upon the other Caſes, which import a different Doctrine.

The Principle of the above Rule, as founded upon Conſideration of the Conveniency of the Parties, with a View to the Rate of Intereſt at which Money can be reaſonably got, accounts for thoſe Inſtances which have, and may, occur ſince the Commencement of the modern Rule, in which Intereſt has, or may be allowed at a greater Rate than 4l. per Cent. per Annum.—In the Caſe of (*a*) Incledon *v.* Northcote, Lord Hardwicke allowed Intereſt at 4½ per Cent. to the Legatees; and aſſigned as the Reaſon for ſo doing, that Money, within the two preceding Years, had increaſed in Quantity, Mortgages then being at 4l. 10s. and ſeveral at 5l. per Cent. And we muſt obſerve, that this Rule of the Court of Chancery is applicable to Caſes only where *no* Intereſt is provided, or given by the Teſtator; for if he have the Power to give *legal Intereſt*, as well as the principal Sum, and

(z) 3 Bro. C. C. 50. (*a*) 3 Atk. 438.

does

does ſo, or gives Intereſt at a *leſs* Rate, than 4l. per Cent. the Court cannot reduce or augment it. (*b*) And it ſeems ſettled, that a Power to charge a *groſs Sum* upon an Eſtate, imparts, *by Implication*, a Power alſo to charge it *with Intereſt*. To this Purpoſe ſee the Caſe of (*c*) Lewis *v.* Freke, and the other Caſes referred to in the Notes.

It is the Practice of the Court of Chancery, as acknowledged in the Caſe of (*d*) Perkyns *v.* Baynton, when *ſubſequent Intereſt* is directed to be computed on a Mortgage, to compute it upon the Principal *and Intereſt* before reported due; but in the Caſes of Bonds and *Legacies*, upon the Principal only. The Reaſon for this Diſtinction between Mortgages and other Debts and Legacies, appears to be this—in the Caſe of a Mortgage, the Defendant, the Mortgagee, has a complete legal Title, and cannot be obliged to part with his Eſtate, before he has been fully paid *all his Demands:* But the latter have no ſuch Lien of which they can take Advantage.

In Caſes where Annuities, bequeathed by Teſtament, have not been regularly paid, ſo that conſiderable Arrears have accrued, and

(*b*) 3 Veſ. Jun. 283. Ibid. 286. Note. (*c*) 2 Veſ. Jun. 507. 2 Salk. 538. 2 Atk. 354. (*d*) 1 Bro. C. C. 574.

Application has been made to the Court of Chancery for an Allowance of Intereſt upon them, that Court has generally refuſed the Application, as in the Caſes of (*e*) Ferrers *v.* Ferrers, (*f*) Batten *v.* Earnley. (*g*) *Anonymus*— (*h*) Robinſon *v.* Cumming, and (*i*) Tew *v.* Winterton.

But it appears from the Caſe of (*k*) Newman *v.* Auling; and the above Caſes of Ferrers *v.* Ferrers, and Robinſon *v.* Cumming, that if the Perſon charged with the Annuity had, at Law, incurred a Forfeiture, by Reaſon of Non-payment, againſt which he was obliged to ſeek Relief in Equity, no Aſſiſtance would be granted him, except upon the Terms of his doing Equity, *viz.* upon firſt conſenting to pay the Grantee of the Annuity all the Arrears due with Intereſt: And we muſt notice, that when the Annuity is ſecured by Bond, no more Intereſt can be recovered than what, with the Arrears due, do not exceed the Penalty of the Obligation. (*l*) Tew *v.* Winterton.

It ſeems that if the Amount of the Arrears due have been fixed and liquidated by the Report of a Maſter of the Court of Chancery, they will carry Intereſt from the Date of it; (*m*) Dra-

(*e*) 2 Forreſt. 2. (*f*) 2 P. Will. 163. (*g*) 2 Veſ. 662. (*h*) 2 Atk. 411. (*i*) 3 Bro. C. C. 489. (*k*) 3 Atk. 579. (*l*) 3 Bro. C. C. 489. (*m*) 2 Atk. 211.

pers

pers Company *v.* Davis. And if Truſtees are bound to make regular Payment of Annuities, but they, in Breach of their Duty, keep the Money in their Hands, the Court will, in ſuch Caſes, decree Payment of the Arrears with Intereſt. To this Purpoſe the Chancellor expreſſed himſelf in the above Caſe of Tew *v.* Winterton.

ON THE VALIDITY OF LEGACIES GIVEN TO CHARITABLE USES.

THE Determinations of Courts of Equity relating to Bequeſts made to charitable or public Purpoſes, have been founded upon very broad and extenſive Principles, as well in Conformity to the Roman and civil Law, which ſhewed particular Indulgence to ſuch Diſpoſitions, as alſo to the Nature of ſuch Bequeſts, which were not capable of the ſame narrow and confined Conſtruction as Legacies given to private Perſons (*a*); but Experience having taught the Legiſlature that the provident and wiſe Statutes of Mortmain were too often evaded by teſtamentary Diſpoſitions in Favour of Charities, and the judicial Deciſions upon them, which required Regulations; it was therefore enacted by the Statute of the 9th Geo. 2, Cap. 36, " That no Manors, " Lands, or Tenements, Rents, Advowſons, or " other Hereditaments, corporeal or incorporeal, " whatſoever, nor *any Sum or Sums of Money*,

(*a*) Domat. 2 Vol. 161, 162.

" *Goods*,

" *Goods, Chattels, Stocks in the public Funds,*
" *Securities for Money, or any other perſonal*
" *Eſtates whatſoever, to be laid out in the Pur-*
" *chaſe of Lands, &c.* ſhall be given, granted,
" aliened, limited, releaſed, transferred, aſ-
" ſigned, or appointed, or any wiſe conveyed
" or ſettled, to or upon any Perſon or Perſons,
" Bodies politic or corporate, or otherwiſe, for
" any Eſtate or Intereſt whatſoever, or any
" Ways charged or incumbered, by any Per-
" ſon or Perſons whatſoever, in Truſt or for the
" Benefit of any charitable Uſes whatſoever,
" unleſs by Deed indented, executed in the
" Preſence of two Witneſſes, twelve Calendar
" Months before the Death of the Donor or
" Grantor, including the Days of the Execu-
" tion and Death, and enrolled in the Court of
" Chancery within ſix Months after its Execu-
" tion; and unleſs ſuch Stocks be transferred
" in the public Books uſually kept for the Trans-
" fer of Stocks, ſix Calendar Months before the
" Death of ſuch Donor or Grantor, including
" the Days of Transfer and Death; and unleſs
" the ſame be made to take Effect in Poſſeſſion
" for the charitable Uſe intended immediately
" from the making thereof, and be without any
" Power of Revocation, Reverſion, Truſt, Condi-
" tion, Limitation, Clauſe, or Agreement whatſo-
" ever, for the Benefit of the Donor or Grantor
" or of any Perſon or Perſons claiming under him.

" Provided always that ſuch Limitations, &c. " ſhall not be conſtrued to extend to any Pur- " chaſe or Transfer made for valuable Conſide- " ration." The Statute then declares, " all other Gifts, Grants, Conveyances, Transfers, &c. to be null and void, with a Proviſoe that it ſhall not be conſtrued to extend to the two Univerſities, their Colleges, and the Scholars upon the Foundation of the Colleges of Eton, Wincheſter, or Weſtminſter." Provided alſo, " that no College ſhall, from June 1736, be at Liberty to purchaſe, acquire, receive, take, or hold more Advowſons than are equal in Number to one Moiety of the Fellows or Students upon the reſpective Foundations. And the Act provided, that Nothing therein contained ſhould be conſtrued to extend to the Diſpoſition, Grant, or Settlement, of any Eſtate, real or perſonal, lying or being within that Part of Great Britain called *Scotland.*"

In the Expoſition of this Statute, it has been adjudged that not only Bequeſts of Money to be inveſted in Lands are void, but alſo ſuch Bequeſts as, *in any Manner, affect or relate to* Intereſts in real Property made for the Benefit of Charities: thus Bequeſts to Charities——

Of Monies to be raiſed by Mortgage, Sale, or otherwiſe, out of Lands, as in the Caſes of (*b*) Ar-

(*b*) 1 Veſ. 108.

nold

nold *v.* Chapman, Dalton *v.* James, cited in (*c*) Mogg *v.* Hodges, and the (*d*) Attorney General *v.* Lord Weymouth——

Of Terms for Years; as in the Caſes of the (*e*) Attorney General *v.* Graves, and the (*f*) Attorney General *v.* Tomkins——

And *of Mortgages;* as in the Caſes of the (*g*) Attorney General *v.* Meyrick, (*h*) Attorney General *v.* Graves, and the (*i*) Attorney General *v.* Caldwell, were adjudged void under the Proviſions of the above Act. We muſt diſtinguiſh, however, between Caſes where the Obligation upon Truſtees and Executors to realize the Money is *imperative* or *directory*, and where it is purely *diſcretionary*. In the *former* Caſes the Legacies will be void, as appears from the Statute, and the following Caſes, *viz.* (*k*) Engliſh *v.* Ord, and (*l*) Grieves *v.* Caſe; but in the *latter* the Bequeſts will be ſupported, as the Truſtees or Executors will not be preſumed deſirous, or, at leaſt, will not be permitted to exerciſe their Diſcretion, to the Prejudice of any Legatees claiming under their Teſtator's Wills. And to this Effect are the Caſes of (*m*) Soreſby *v.* Hol-

(*c*) 2 Veſ. 52. (*d*) Ambl. 20. (*e*) Ambl. 155. (*f*) Ambl. 216. (*g*) 2 Veſ. 44. (*h*) Ambl. 155. (*i*) Ambl. 635. (*k*) Highmore on Mortmain, Page 82. (*l*) 1 Veſ. Jun. Ch. Ca. 548. (*m*) Highmore, 74.

lins,

lins, (*n*) Grimmett *v.* Grimmett, and the ſeveral other Caſes therein cited.

And if the Legacy is *not* directed to be laid out in Land, but muſt *neceſſarily* be ſo from the Nature of the Charity, as in Bequeſts to the Governors of Queen Ann's Bounty, the Legacies cannot be ſupported. And ſo it was determined in the Caſes of (*o*) Widmore *v.* Woodroffe, and (*p*) Middleton *v.* Clitherow.

We muſt obſerve, however, that where Money is directed by Will to be applied ſimply in the *Melioration of Lands in Mortmain*, or *for building upon them*, ſuch Direction will be enforced; and for this Reaſon—becauſe Bequeſts of ſuch a Nature are not within the Intent and Meaning of the Statutes of Mortmain, their Object being to prevent *any Addition* to the Quantity of Lands already in Mortmain, and not to impede their Melioration or Improvement. Purſuant to this Diſtinction were decided the Caſes of (*q*) Glubb *v.* the Attorney General, (*r*) Harris *v.* Barnes, (*s*) Attorney General *v.* the Biſhop of Cheſter, and Brodie *v.* the Duke of Chandos, in a Note to the laſt Caſe.

(*n*) Ambl. 210. (*o*) Ambl. 637. (*p*) 3 Veſ. Jun. Ch. Ca. 734. (*q*) Ambl. 373. (*r*) Ambl. 651. (*s*) 1 Brown Ch. Ca. 444.

But

But the Teſtator muſt *point out the Lands in Mortmain* upon which the Buildings are to be erected, for if he give a Legacy to be applied in erecting or building a Houſe for a charitable Purpoſe, *generally*, the Bequeſt cannot be ſupported; and to this Effect are the Caſes of the (*t*) Attorney General *v.* Tyndall, (*u*) Attorney General *v.* Hyde, (*x*) Attorney General *v.* Hutchinſon, (*y*) Pelham *v.* Anderſon, (*z*) Attorney General *v.* Naſh, and Foy *v.* Foy, cited in the laſt Caſe,

If, indeed, the Teſtator has mentioned *particular Objects* in his Will, who are in the firſt Place to enjoy the Benefit of a general charitable Bequeſt, the Court will ſupport the Legacy in Favour of the Perſons deſcribed, although it will annul the ſame, in Regard to the *general Purpoſes* of the Charity. Thus, where *A* bequeathed all his real and perſonal Eſtates to Truſtees to ſell, and to inveſt the purchaſe Money in the public Funds, and out of the Produce thereof to take upon Leaſe or otherwiſe a proper Houſe fitted up for a School for the Reception and Education of the Children and Grandchildren of his Relations, (nameing them) with Directions for placing them

(*t*) Ambl. 614. (*u*) Ambl. 751. (*x*) 1 Brown, Ch. Ca. 444. Note. (*y*) Ibid. Note. (*z*) 3 Brown, Ch. Ca. 588.

out

out Apprentices at a proper Age; and alſo for admitting *ſuch further Number of Children*, as the yearly Income of the truſt Fund would extend to educate; it was determined upon a Queſtion on the Validity of the Bequeſt, that the ſame was good, ſo far as related to the Children and Grandchildren particularly named, but illegal and void ſo far as related to the *permanent and general Purpoſes* of the Charity; (*a*) Blandford v. Fackerell.

Bequeſts, alſo, of perſonal Property to *ſuperſtitious Uſes*, are illegal and void: Uſes are conſidered as *ſuperſtitious*, when they relate, or have Reſpect to any of the corrupt Fantaſies of the Popiſh Church; as where Money is given to procure the ſaying of Maſſes, for the Soul of the Deviſor, or for the Support of a Chauntry Prieſt, and the like. (*b*) Legacies given to the ſuperſtitious Uſes, mentioned in the Statute of 1 Edward VI. (*c*) are veſted in the Crown *beneficially*; it ſeems, however, from the Caſe of the (*d*) King v. Lady Portington; that although Bequeſts made in Favour of other ſuperſtitious Uſes, not comprized in that Act, do not veſt in the Crown beneficially; yet, that the King ſhall have the Appointment of them, to ſuch Uſes as he may think proper.

(*a*) 4 Brown, Ch. Ca. 394. (*b*) Duke's Ch. Uſes, 106. (*c*) Cap. 14. 4 Rep. 104, b. (*d*) 1 Salk. 162. 2 Vern. 256.

Purſuant to the ſame liberal Conſtruction which prevails in Courts of Equity, in Favour of Charities, it is ſettled, that if a Legacy be given to a charitable Uſe, *generally*, without particularizing the Nature of the Charity, or the Mode of Application, the Bequeſt nevertheleſs ſhall be ſupported; (*f*) and ſo it appears from the Caſes of (*g*) Baylis *v.* Church, and the (*h*) Attorney General *v.* Herrick—*a fortiori*—therefore the Rule is the ſame, where the Nature of the Charity is deſcribed, by refering to the *Objects* of it *generally*, although no particular Perſons of the deſcript Claſs are ſelected to take the Legacy; and to this Effect are the Caſes of the (*i*) Attorney General *v.* Clarke, (*k*) Cook v. Duckenfield, (*l*) White *v.* White, and (*m*) Moggridge *v.* Thackwell.

And in Caſes where the Charity is not illegal, but the particular Mode directed for its Execution cannot take Place, yet, if the Teſtator's Intention can be effectuated, the Court of Chancery will ſupport the Bequeſt, and ſubſtitute another Mode of Application, conſiſtent with ſuch Intention: and to this Purpoſe are the Caſes of the (*n*) Attorney General *v.* the City of London, and (*o*) Attorney General *v.* Bowyer.

(*f*) Dukes Ch. Uſes, 79, 80. (*g*) 2 Atk. 239. (*h*) Ambl. 712. (*i*) Ambl. 422. (*k*) 2 Atk. 562. (*l*) 1 Bro. C. C. 12. (*m*) 3 Bro. C. C. 517. (*n*) 3 Bro. C. C. 171. (*o*) 3 Veſ. Jun. C.C 714.

But

But if the Teſtator's View is confined to the *ſole Purpoſe* of eſtabliſhing and ſupporting *a particular Charity*, which cannot take Effect; the particular Mode will be conſidered *as of the Eſſence of the Bequeſt*, and the Court will not apply the Fund bequeathed to any other charitable Purpoſe; but the Legacy will be conſidered as void. To this Effect are the Caſes of the (*p*) Attorney General *v.* the Biſhop of Oxford, (*q*) Attorney General *v.* Andrew, and the (*r*) Attorney General *v.* Whitchurch.

(*p*) 1 Bro. C. C. 444, in Notes. (*q*) 3 Veſ. Jun. C. C. 622
(*r*) Ibid. Page 141.

ON

ON THE PAYMENT, AND APPROPRIATION OF LEGACIES.

IN general, where no Time is appointed by Teſtament for Payment of Legacies, they muſt be paid out of the Teſtator's Aſſets at the Expiration of one Year after his Deceaſe. And if no Fund be aſſigned for their Payment, ſuch Legacies muſt be paid in the Currency of that Country where the Will was made. See the Caſes of (*a*) Phipps *v.* Earl of Angleſea; (*b*) Wallis *v.* Brightwell; (*c*) Pierſon *v.* Garnet, and (*d*) Malcolm *v.* Martin.

When a Legacy is given to an Infant, *generally*, the Executor cannot ſafely pay it before the Legatee arrive at the Age of 21, without the Direction and Indemnity of a Court of Equity (*e*); Dagley *v.* Tolferry. In a ſubſequent Caſe of (*f*) Philips *v.* Paget, which

(*a*) 1 P. Will. 696. (*b*) 2 P. Will. 88. (*c*) 2 Bro. C. C. 39. (*d*) 3 Bro. C. C. 50. (*e*) 1 P. Will. 285. (*f*) 2 Atk. 80.

came before Lord Hardwicke, the Executor had actually paid the Legacies to the Infant Legatees; and his Lordſhip intimated his Opinion, that the Rule laid down in the Caſe laſt referred to was too ſtrict; but he being apparently preſſed with the Conſideration of the Inconveniency which might enſue from a legal Adjudication in Favour of ſuch Payments, avoided deciding upon the Subject, and recommended a Compromiſe to the Executor, by adviſing him to pay over again a Part of the Legacy, which was accordingly aſſented to, and the Matter ſettled.

An Executor will not be allowed any Payments for the Infant Legatee's Benefit, except for expreſs Neceſſaries, (*g*) Davies *v.* Auſten. But if a Legacy were given to *A* to be divided between himſelf and Family, Payment of the whole Legacy to *A* by the Executor would be good, notwithſtanding many of *A*'s Family might be Infants. See the Caſe of (*h*) Cooper *v.* Thornton.

In general, Legacies bequeathed to *femes coverts*, ought to be paid to their Huſbands. But in Caſes where the Huſband has made no Proviſion for his Wife, the Executors may (if

(*g*) 3 Bro. C. C. 178. (*h*) 3 Bro. C. C. 96.

they

they think proper) with-hold Payment of the Legacy until he conſent to make a ſuitable Proviſion for her, as the Court of Chancery, upon a Bill exhibited for Payment of the Legacy, would refuſe to order Payment of it to the Huſband, unleſs he conſented to make a reaſonable Settlement on the Wife; (*i*) Adams *v.* Pierce, (*k*) Brown *v.* Elton, and (*l*) Milner *v.* Colmer. If the Wife however conſent in Court, or before proper Commiſſioners abroad, for the Huſband to receive her Legacy, the Court will decree it accordingly, without requiring any Settlement; as appears from the Caſes of (*m*) Willats *v.* Cay, (*n*) Milner *v.* Colmer, (*o*) Parſons *v.* Dunne, (*p*) *ex Parte* Higham, (*q*) Pearſon *v.* Brereton, (*r*) Minet *v.* Hyde, (*s*) Dimmock *v.* Atkinſon, and (*t*) Ellis *v.* Atkinſon. But we muſt except thoſe Caſes where it appeared from the Manner in which the Legacy was given, that it was not intended ſhe ſhould have the Power to make an *immediate* abſolute and irrevocable Diſpoſition of it; Socket *v.* Wray, ſtated in a Note to the Caſe of (*u*) Willats *v.* Cay, by Mr. Saunders, in his Edition of Atkins.

(*i*) 3 P. Will. 12. (*k*) Ibid. 202. (*l*) 2 P. Will. 638. (*m*) 2 Atk. 67. (*n*) 2 P. Will. 638. (*o*) 2 Veſ. 60. (*p*) Ibid. 579. (*q*) 3 Atk. 71. (*r*) 2 Bro. C. C. 663. (*s*) 3 Bro. C. C. 195. (*t*) Ibid. 565. (*u*) 2 Atk. 67.

When the *feme* Legatee is a Subject of a foreign State, by the Law of which the Huſband would be intitled to receive the Whole of his Wife's Property, without making any Proviſion for her in the firſt Place, the Court of Chancery will, in ſuch Caſes, diſpenſe with the Wife's Conſent, and decree the Legacy to be paid to her Huſband (*v*) Campbell *v.* French.

Courts of Equity have laid down the following Diſtinction between different Legatees of the ſame Thing, and their Repreſentatives, *viz.* that if a Legacy be given to *A*, payable at 21, if *A* die before that Period, his Repreſentative muſt wait for Payment of the Legacy until *A* (if living) would have attained 21. But if the Legacy had been limited over to *B* in Default of *A*'s attaining 21, and *A* died before that Time, *B* would immediately upon *A*'s Death become intitled to call for Payment of the Legacy; and upon this reaſoning, the Repreſentative of *A* could claim Nothing but in like Manner as *A* himſelf would have done; therefore, as *A* had no Power to call for his Legacy before he attained 21, neither could his Repreſentative inſiſt upon Payment of it ſooner. But in the latter Caſe *B*, the Legatee over, does not

(*v*) 3 Veſ. Jun. C. C. 323.

derive

derive his Title through *A*, but under the Teſtator's Will, by a diſtinct and ſubſtantive Gift upon the Contingency of *A* dying under 21; ſo that whenever that Event happened, the Time of Payment not being poſtponed, *B* became immediately intitled to receive the Legacy. See the Caſes of (*w*) Cheſther *v.* Painter, (*x*) Laundy *v.* Williams, and (*y*) Roden *v.* Smith. But if Intereſt be given to the Legatee during Minority, as Intereſt is conſidered to be given for Delay of Payment, the Repreſentative ſhall not wait for the Legacy until *A* would have attained 21; (*z*) Green *v.* Pigot.

I am not aware that it has been finally ſettled, whether any ſuch Diſtinctions as laſt mentioned are applicable to Legacies charged upon, or originally payable out of real Eſtate. There is one Caſe however which I have met with, in which the Deciſion is againſt the Application of ſuch Diſtinction; that Caſe is (*a*) Feltham *v.* Feltham, and was to the following Effect: *A* having ſeveral Daughters, and being ſeized in Fee of Lands, by his Will charged the Premiſes with Payment of his Daughters Portions, *viz.* 1000l. to each Daughter at her Age of 22 Years, or Marriage; but if any of his Daughters

(*w*) 2 P. Will. 336. (*x*) Ibid. 478. (*y*) Ambl. 588. (*z*) 1 Bro. C. C. 105. (*a*) 2 P. Will. 271.

ſhould die before her Portion became payable, the Share of her ſo dying was to go to the Survivors: one of the Daughters having died before 22 or marriage, and another of them having attained that Age, it was inſiſted, that as there was no Time appointed for Payment of the Portion or Legacy, which accrued by Survivorſhip, it ought to be paid preſently. But it was determined by Lords Commiſſioners Jekyll and Gilbert, that the accruing, or additional Portion, was not payable before ſuch Time as the Daughter, to whom it was *originally* given, would have attained the Age of 22 Years if ſhe had lived, on the Grounds that a contrary Deciſion might be injurious to the *Heir*, as alſo againſt the Intention of the Teſtator, who might have computed within what Period the Portions could be raiſed and paid with the leaſt Inconveniency to his Succeſſor.

In Caſes where there is a Subſtitution or Addition of Legacies, and no Time is limited for Payment of them, nor any Fund aſſigned out of which they are to be paid, it ſeems that ſuch ſubſtituted and additional Legacies will be payable out of the ſame Funds, and be ſubject to the like Conditions, &c. as the Legacies in Lieu of, or in Addition to which they were given. To this Purpoſe are the Caſes of

Leacroft

(b) Leacroft *v.* Maynard, and (c) Crowder *v.* Clowes.

Preſumptive Payment.

COURTS of Equity are never active in extending Relief to *Stale* Demands, except upon very ſpecial Grounds; and although the Statute of Limitations does not by expreſs Letter bind thoſe Courts, ſo as to enable a Defendant to plead it in bar of a Suit for a Legacy (d), yet they have for the Sake of Conveniency adopted its Proviſions by Analogy in many Inſtances, in which Fraud or Covin made no Ingredient. Upon this Principle it has been decided that a Legacy not demanded for the Space of *forty years*, ſhould be conſidered as, *primâ Facie*, ſatisfied. But this Preſumption is not ſo abſolute as to ſupport a Demurrer to a Bill brought for ſuch a Legacy; for the Satisfaction of it is an Inference only, ariſing from the Length of Time which has elapſed from the Period the Legacy became payable, and which may be repelled by *clear*, *ſtrong*, and *relevant* Evi- vid 2 Rees 22.

(b) 3 Bro. C. C. 233. 1 Veſ. Jun. 279. S. C. (c) 2 Veſ. Jun. 449. (d) 2 Veſ. Jun. 571.

dence; but if the Merits of the Queſtion were permitted to be decided in a ſummary Way upon Demurrer, the Legatee would be precluded from the Opportunity of producing ſuch Teſtimony. See the Caſes of (*e*) Jones *v.* Tuberville; and (*f*) Deloraine *v.* Browne.

In the Caſe of (*g*) Pickering *v.* Lord Stamford, which came before the Maſter of the Rolls upon a Claim made by the Repreſentative of one of the Teſtator's next of Kin, after a Lapſe of *thirty-five Years*, to ſuch Parts of the Teſtator's reſiduary Eſtate as were ſecured upon real Property, on the Ground that the Diſpoſition was void by the Statute of Mortmain, his Honour acknowledged the Propriety of the Deciſion in the above Caſe of Jones *v.* Tuberville, and ſaid that if the Caſe before him had been upon the Subject of a *Legacy*, he ſhould have been of Opinion that a Bar had incurred from the Time which had elapſed, upon the Score of preſumptive Satisfaction.

(*e*) 2 Veſ. Jun. 11. (*f*) 3 Bro. 633. 646. (*g*) 2 Veſ. Jun. 272.

Appropriation

Appropriation of Legacies.

Although Legatees are not intitled to receive their Legacies before the Time appointed for Payment, yet they are intitled to have them divided from the Bulk of the Teſtator's Eſtate, and ſecured and appropriated for their Benefit, whenever the Event ſhall take place upon which ſuch Legacies are payable, without any Diſtinction whether they are *contingent*, or whether they are *veſted*, the Time of Payment being poſtponed only; as appears from the Caſes of *(h)* Green *v.* Pigott, *(i)* Carey *v.* Aſkew, *(k)* Cooper *v.* Douglas, and *(l)* Hutcheſon *v.* Hammond.

Annuitants alſo are intitled to the ſame Equity as Legatees in Regard to Appropriation, and may oblige the Executor to ſet apart a ſufficient Fund to anſwer the regular Payment of the Annuities; *(m)* Slanning *v.* Style.

Such appears to be the preſent Rule of the Court of Chancery with Reſpect to the Appropriation of Legacies, as ſettled by the ſeveral

(h) 1 Bro. C. C. 103. *(i)* 2 Bro. C. C. 58. *(k)* Ibid. 239.
(l) 3 Bro. C. C. 128. *(m)* 3 P. Will. 335.

Caſes before referred to. We muſt obſerve, however, that this Rule has not been uniform at all Periods, the Law of the Court in Lord Hardwicke's Time appearing to have been, from the Caſes of *(n)* Palmer *v.* Maſon, and *(o)* Heath *v.* Perry, that Legacies ſhould in no Caſe be raiſed before the Time fixed for their Payment.

In Caſes where Parts of the Teſtator's perſonal Eſtate are *ſpecifically bequeathed* for Life, with a Limitation over upon the Deceaſe of the Perſon taking the Life-Intereſt, ſuch Legatee muſt ſign and deliver an Inventory of the Chattels ſo bequeathed to him, in Order that they may be aſcertained for the Information and Benefit of the Legatee over; *(p)* Slanning *v.* Style.

(n) 1 Atk. 505. *(o)* 3 Atk. 101. *(p)* 3 P. Will. 335.

ADEMPTION OF PECUNIARY LEGACIES.

IT is a general Rule, that where an immediate Advancement or Proviſion is made by a Parent, or other Perſon *in Loco Parentis*, for a Child before provided for by the Will of the Parent, or ſuch Perſon as laſt mentioned, the ſubſequent Advancement or Proviſion will be conſidered as an Ademption or Satisfaction of the Legacy. To this Purpoſe are the Caſes of (*a*) Hartop *v.* Whitmore, (*b*) Biggleſton *v.* Grubb, (*c*) Elkinhead's Caſe cited in Jeſſon *v.* Jeſſon, Tapper *v.* Chalcroft, cited in (*d*) Spinks *v.* Robins, (*e*) Ward *v.* Lant, (*f*) Watſon *v.* Earl of Lincoln, (*g*) Irod *v.* Hurſt, (*h*) Jenkins *v.* Powel, (*i*) Scotton *v.* Scotton, and (*k*) Elliſon *v.* Cookſon.

(*a*) Ch. Pre. 541. P. Will. 681. S. C. (*b*) 2 Atk. 48. (*c*) 2 Vern. 257. (*d*) 2 Atk. 492. (*e*) Ch. Pre. 182. (*f*) Ambl. 325. (*g*) 2 Freem. 224. (*h*) 2 Vern. 115. (*i*) 1 Str. 235. (*k*) 1 Veſ. Jun. 100.

The

The Rule, however, being a Rule of *Preſumption* only, parol Evidence will be admitted to rebut the Inference; as appears from the Caſes of (*l*) Roſewell *v.* Bennett, and (*m*) Debeze *v.* Mann. In Elliſon *v.* Cookſon, parol Evidence was admitted; but that Evidence being inſufficient to repel the Preſumption in Favour of the Ademption, the Advancement was, by Decree at the Rolls, which was afterwards affirmed upon Appeal, adjudged to go in Satisfaction of the Legacy. And in the Caſe of (*n*) Maſcal *v.* Maſcal, Evidence was alſo admitted to ſhew that an Annuity of 100l. ſettled upon the Wife by her Huſband after the making of his Will, was intended as a Satisfaction of a like Annuity bequeathed to her by it. And ſuch Evidence has likewiſe been admitted in the following Caſes, *viz.* (*o*) Pile *v.* Pile, (*p*) Chapman *v.* Salt, (*q*) Shudal *v.* Jekyl, and (*r*) Hinchliffe *v.* Hinchliffe. So that it appears that Lord Hardwicke's Deciſion, in (*s*) Farnham *v.* Philipps, againſt the Admiſſion of parol Evidence in theſe Caſes, has not been followed.

The Principle of this Rule of Ademption or Satisfaction, has been much diſapproved of by

(*l*) 3 Atk. 77. (*m*) 2 Bro. C. C. 165, 519. (*n*) 1 Veſ. 323. (*o*) 1 Ch. Rep. 199. (*p*) 2 Vern. 646. (*q*) 2 Atk. 515. (*r*) 3 Veſ. Jun. 516. (*s*) 2 Atk. 214.

Courts of Equity, as often defeating the Intention of the Parties. The Rule, however, is not of their own Creation, but was borrowed from the Civil Law. The Reaſons aſſigned in Support of it are not ſatisfactory; for when a Man is diſpoſing of his Property by Teſtament, he does ſo *with a View to the Period of his Death;* but when he diſpoſes of it *by preſent Gift,* he does ſo with a Regard *to his Life;* ſo that he may be allowed with Propriety to be more liberal in the one Caſe than in the other, and to intend a further Bounty to the Perſon advanced when his the Donor's Life ſhall determine. Such being the Diſpoſition of theſe Courts towards the Rule, they have laid hold of little Circumſtances to form Caſes into Exceptions. Therefore if the Legacy and Advancement be *non ejuſdem Generis,* the latter will be no Ademption of the former, as if the Bequeſt was *pecuniary,* and the Advancement *by Grant of a beneficial Leaſe.* And the Reaſon is, that the Court preſumes, from conſidering the *different Natures of the Funds,* that the Teſtator did not intend the Advancement to go in Satisfaction of the Legacy; (*t*) Grave *v.* the Earl of Saliſbury, and (*u*) Holmes *v.* Holmes.

And upon a ſimilar Inference of Intention, if the Legacy and Advancement depend upon

(*t*) 1 Bro. C. C. 425. (*u*) Ibid. 555.

different

different Contingencies, the former will not be adeemed by the latter; as appears from the Caſe of (*x*) Spinks *v.* Robins.

If the Bequeſt and ſubſequent Advancement be made by *Strangers*, or diſtant collateral Relations, not ſtanding *in Loco Parentum*, and no Intention appears in Favour of an Ademption, ſuch Advancement will not deſtroy the Legacy; for as there is no Obligation upon ſuch Perſons to provide for the Legatees, no Inference therefore ariſes that they intended, by a ſubſequent Gift or Advancement, to perform any ſuch Obligation *in preſenti*, which they had provided for by Will after their Deceaſe. See the Caſes of (*y*) Shudal *v.* Jekyll, and (*z*) Powell *v.* Cleaver.

If the Legacy and Advancement be given for *different Purpoſes*, as if the Legacy were general, and the Advancement or Proviſion made *in Lieu of, or in Compenſation for ſome other Intereſt* to which the Legatee was intitled, the Preſumption of Ademption would be repelled; as appears from the Caſes of (*a*) Roome *v.* Roome, and (*b*) Baugh *v.* Read.

And it ſeems that unleſs the Legacy *be certain in Amount*, a ſubſequent Advancement will be

(*x*) 2 Atk. 491. (*y*) 2 Atk. 515. (*z*) 2 Bro. C. C. 500. (*a*) 3 Atk. 181. (*b*) 1 Veſ. Jun. 257.

no

no Ademption; therefore if the Bequeſt be of a *Reſidue*, an after Gift or Proviſion will not merge it. See the Caſes of (*c*) Barret *v.* Beckford, (*d*) Deveſe *v.* Pontet, and (*e*) Farnham *v.* Phillips.

As Tranſactions between Parents and Children are looked upon in a different View from ſuch as take place between Strangers, if a Legacy were given to *B*, the Daughter of *A*, and ſuch Legacy became the Debt of *A*, as by his being appointed Executor or otherwiſe, and *A* ſhould afterwards advance *B*, upon Marriage, or on ſome other Occaſion, with a Portion or Sum equal to the Debt, ſuch Advancement would be conſidered as an Ademption or Satisfaction of it. To this Purpoſe are the Caſes of (*f*) Wood *v.* Briant, in which Caſe Lord Hardwicke diſapproved of Sir John Trevor's Decree in (*g*) Chudley *v.* Lee; (*h*) Seed *v.* Bradford.

We may notice in the Peruſal of the Caſe of Wood *v.* Briant, juſt referred to, that although the Bequeſt was of a *Reſidue*, yet the Advancement of the Parent was adjudged to go in Satisfaction of it; but it is obſervable that the Principle upon which the Court of Chancery founded its Decrees

(*c*) 1 Veſ. 520. (*d*) Ch. Pr e. 240, cited in a note. (*e*) 2 Atk. 215. (*f*) 2 Atk. 522. (*g*) Ch. Pre. 228. (*h*) 1 Veſ. 501.

in

in the prior Caſes with regard to Reſidues not being adeemed by ſubſequent Advancements, *viz.* " The Inference of Intention drawn from the Fluctuation and Uncertainty of a Reſidue that Teſtators did not mean to defeat ſuch a Bequeſt by the ſubſequent Gift of a certain Sum which might probably be of leſs Value than the Reſidue," did not apply to that Caſe for the Father being appointed *Adminiſtrator durante minori Ætate of his Daughter*, the reſiduary Legatee, it was to be preſumed that he was acquainted with the Amount of the Reſidue upon the Teſtator's Deceaſe, which became *upon that Event* fixed and unchangeably ſettled.

THE

THE ABATEMENT AND REFUNDING OF LEGACIES.

IF a Teſtator's Aſſets are inſufficient to pay both Debts and Legacies, the pecuniary Legatees muſt abate proportionably *inter ſe*; and if any of them has received the whole Amount of his Legacy, ſuch Legatee will be obliged to refund ſo much as will reduce it to an Equality with thoſe of the other Legatees; *(a)* Maſters *v.* Maſters, *(b) Anonymus.*

It is, however, a Rule in Equity to preſume that whenever an Executor pays a Legacy he has poſſeſſed Aſſets ſufficient to ſatisfy all the other Legatees; and, although the Fact may be otherwiſe, yet not to admit of Proof to the contrary; therefore, in ſuch Caſes, Executors will be obliged to make up the Deficiency out of their own Pookets, as the Court will not permit them to inſtitute a Suit againſt the Le-

(*a*) 1 P. Will. 422. (*b*) Ibid. 495.

gatees,

gatees, whom they have voluntarily paid, to oblige them to refund; *(c)* Noel *v.* Robinſon, *(d)* Newman *v.* Barton, and *(e)* Coppin *v.* Coppin. But *a Legatee* who is injured by ſuch Conduct in the Executor, may, by Bill in Equity, oblige the ſatisfied Legatees to refund a proportionate Part of their Legacies, *if the Executor be inſolvent.* To this Purpoſe Sir John Strange expreſſed himſelf in the Caſe of *(f)* Orr *v.* Kaines, *viz.* "That if an Executor *prove* "*inſolvent*, the Court will admit of a Bill by "the other Legatees to compel the ſatisfied "Legatees to refund." The Caſe of Newman *v.* Barton, juſt referred to, ſeems to deny the Propoſition; but we muſt notice, that it does not appear from that Caſe whether the Executor was *ſolvent or not;* for if he was, then the proper Remedy would be *againſt him, or his Aſſets in the firſt Inſtance*, which would reconcile that Caſe with the other Determinations on the Subject.

As Legatees may compel their Co-Legatees to refund, *a fortiori, Creditors* will be intitled to the ſame Privilege; and, moreover, to purſue the Aſſets into whatſoever Hands they may com *(h)*.

(c) 1 Vern. 90. *(d)* 2 Vern. 205. *(e)* 2 P. Will. 291. 297. *(f)* 2 Veſ. 194. *(h)* 1 Vern. 94. 2 Vern. 205.

Specific

Specific Legatees have this Advantage over *pecuniary*, that the former ſhall make no Abatement upon a Deficiency of Aſſets to pay all the Legacies bequeathed; but on the contrary, they have this Diſadvantage, that if the ſpecific Fund fail, they will be intitled to no Contribution from the *pecuniary* Legatees, nor to have their Legacies paid out of the Teſtator's general Aſſets, *(i)* Hinton *v.* Pinke, and *(k)* Sleech *v.* Thorington. And if all the perſonal Eſtate, not ſpecifically bequeathed, be exhauſted in ſatisfying a Part of the Teſtator's Debts, then the *ſpecific Legatees* will be obliged to abate proportionably *inter ſe*, to diſcharge the Remainder of them; *(l)* Long *v.* Short, and *(m)* Duke of Devon *v.* Atkins.

A Caſe indeed may happen in which *ſpecific* Legatees will be obliged to abate in Favour of a *pecuniary* Legatee. Thus, if a Perſon poſſeſſing perſonal Eſtate at *B* and *C* only, bequeath it ſpecifically to *D* and *E*, and then gives a Legacy to *F*, the perſonal Eſtate at *B* and *C* will be liable to the Payment of this Legacy, as there never was any other Fund out of which *F*'s Legacy could have been ſatisfied *(n)*.

(*i*) 1 P. Will. 539. (*k*) 2 Veſ. 561. (*l*) 1 P. Will. 403. (*m*) 2 P. Will. 381. 383. (*n*) Ch. Pre. 393.

There have been Caſes when ſome pecuniary Legatees have claimed a Priority in Satisfaction of their Legacies before other Legatees, ſo as not to abate in Proportion with them upon a Deficiency of Aſſets. Theſe Caſes indeed depend upon very ſpecial Circumſtances, the particular Situation and Deſcription of the Legatees, as *a Wife or Child unprovided for*, (*o*) Lewin *v.* Lewin, or when the Legacies were given *in Lieu of ſome other Demand* to which the Legatees were intitled, as in Satisfaction of Dower and the like, (*p*) Burridge *v.* Bradyl, (*q*) Marſh *v.* Evans, (*r*) Attorney General *v.* Robins, (*s*) Blower *v.* Morret, and (*t*) Davenhill *v.* Fletcher.

Legacies bequeathed to *charitable Uſes* muſt alſo abate proportionably with the other pecuniary Legatees; for although the *civil Law* gives a Preference to ſuch Legacies, yet the Law of England has made no ſuch Diſtinction. See the Caſes of the (*u*) Attorney General *v.* Hudſon, (*v*) Maſters *v.* Maſters, and (*w*) Attorney General *v.* Robins. In this laſt Caſe we muſt obſerve, that the Teſtator alſo bequeathed 3l. per Annum *to the Poor of three ſeveral Pariſhes*, and the Court determined that

(*o*) 2 Veſ. 415. (*p*) 1 P. Will. 127. (*q*) Ibid. 668. (*r*) 2 P. Will. 23. (*s*) 2 Veſ. 420. (*t*) Ambl. 244. (*u*) 1 P. Will. 674. (*v*) Ibid. 422. (*w*) 2 P. Will. 25.

this

this Legacy ſhould make *no Abatement* with the other Legatees, and aſſigned as a Reaſon that the Bequeſt was to be conſidered as a Part of the Funeral, and as *Doles* at the Funeral; and in Maſters *v.* Maſters, the Teſtatrix bequeathed 200l. *to erect a Monument* for her Mother; and it being objected to an Abatement, that the Legacy was to be conſidered as *a Debt of Piety* to the Mother's Memory, the Court decreed that the Legacy ſhould *not come into Average.*

Legacies bequeathed to *Executors* and *Truſtees* for their Trouble in executing the Truſts of the Will, muſt alſo abate *pro Ratâ* with the other Legatees (*x*); Attorney General *v.* Robins, and (*y*) Heron *v.* Heron.

Legacies given to *Servants* are to abate in Proportion with other Legatees (*z*); as are alſo Legacies bequeathed to *Creditors* who have compounded with the Teſtator for their Debts, and accepted leſs than the Amount of them, inaſmuch as ſuch prior Creditors will be conſidered as *voluntary Legatees only* (*a*); Coppin *v.* Coppin.

Bequeſts of *Annuities,* charged upon the Teſtator's perſonal Eſtate, muſt alſo abate with the Le-

(*x*) 2 P. Will. 25. (*y*) 2 Atk. 171. (*z*) 2 P. Will. 25. (*a*) 2 P. Will. 293. 296.

gatees, as ſuch Bequeſts are not conſidered *ſpecific (b)*; Hinton *v.* Pinke, (*c*) Halton *v.* Medlicot, and *(d)* Hume *v.* Edwards.

There is a Caſe of *(e)* Dyoſe *v.* Dyoſe, in which it was decided that pecuniary Legatees (upon a waſting of Aſſets) ſhould not be paid the whole of their Legacies *to the Diſappointment of the reſiduary Legatee;* but that they and the reſiduary Legatee ſhould abate proportionably. The Authority of this Caſe, however, was denied by Lord Thurlow in that of (*f*) Fonnereau *v.* Poyntz, upon the Prinple that all Legacies muſt be paid before the reſiduary Legatee can take any Thing.

(*b*) 1 P. Will. 539. (*c*) Cited, 2 Veſ. 417. (*d*) 3 Atk. 693. (*e*) 1 P. Will. 305. (*f*) 1 Bro. C. C. 478.

ON

ON LAPSED LEGACIES.

IT is a general Rule, that if a Legatee die in the Teſtator's Life-time, the Legacy ſhall lapſe or fall into the general perſonal Eſtate of the Teſtator; (*a*) Bagwell *v.* Day, and (*b*) Ackroyd *v.* Smithſon.

And it will make no Difference in Regard to the Application of the Rule, although the Legacy be given to the Legatee, his *Executors or Adminiſtrators;* (*c*) Elliot *v.* Davenport, and (*d*) Maybank *v.* Brooks. We muſt except, however, the Caſe of Truſtees; for if a Legacy were bequeathed to *B* in Truſt for *C*, and *B* died in the Teſtator's Life-time, living *C*, who ſurvived the Teſtator, *B*'s Death would not be permitted to injure *C*, but *C* would be intitled to the Legacy; (*e*) Eales *v.* England.

A Diſtinction, indeed, prevails in reſpect to Lapſes, when the Bequeſt is intended to operate

(*a*) 1 P. Will. 700. (*b*) 1 Bro. C. C. 503. (*c*) 1 P. Will. 84. (*d*) 1 Bro. C. C. 84. (*e*) Ch. Pre. 200.

in the Nature of a Releaſe or Extinguiſhment of a Debt, and when as a Legacy ſimply. In the latter Caſe we have ſeen that the Death of the Legatee, during the Life of the Teſtator, will create a Lapſe; but in the former Caſe the Court of Chancery will carry the Intention of the Teſtator into Effect againſt all Perſons, *except Creditors.* Thus if a Teſtator expreſſed in his Will that he forgave *B* a Debt, and directed his Executors to cancel or give up the Security, although *B* died in the Teſtator's Life-time, yet the Debt would be conſidered extinct in reſpect of all Perſons except Creditors. See the Caſe of (*f*) Sibthorp *v.* Moxom.

The general Rule of Equity relating to Lapſes occaſioned by the Death of Legatees in the Life-time of Teſtators, is not ſo inflexible but that the latter may prevent ſuch Lapſes by an expreſs Proviſion for the Purpoſe; it ſeems neceſſary, however, that ſome other Perſons ſhould be named to take the Legacies upon the Death of the Legatees during the Life of the Teſtators; for if no ſuch Appointment be made, an expreſs Declaration that the Legacies ſhould not be defeated by the Death of the Legatees in the Life-time of the Donors, will not be ſufficient to prevent the Lapſes which will incur upon thoſe Events happening. See the Caſes of

(*f*) 3 Atk. 579.

Bridge

(*g*) Bridge *v.* Abbot, (*h*) Sibley *v.* Cook; and the other References in the Notes (*i*).

This laſt Caſe of Sibley *v.* Cook may appear at the firſt Impreſſion to claſh in Principle with the two Caſes of Elliot *v.* Davenport, and Maybank *v.* Brooks before referred to; but it ſeems that they may be reconciled. In the Caſe of Sibley *v.* Cook, the Bequeſt was in the following Words: "I give and deviſe the ſeveral Legacies and Sums following, which I will ſhall be paid to the ſeveral Perſons hereinafter named; *and that if any of thoſe Perſons ſhould die before the ſame became due and payable, I will that they or any of them ſhall not be deemed lapſed Legacies.*" The Teſtatrix then particularizes the ſeveral Legatees, and ſays: "To *B*, the Wife of *C*, *and to her Executors or Adminiſtrators, I give* the Sum of 50." *B* died in the Teſtatrix's Life-time, and her Huſband adminiſtered to her. The Queſtion was, whether *B*'s Legacy was lapſed upon the Event which happened; and Lord Hardwicke determined that it did not lapſe; as, in Caſe of *B*'s Death before the Teſtatrix, other Perſons were named to take, *viz. the Executors or Adminiſtrators of B.*

(*g*) 3 Bro. C. C. 224. (*h*) 3 Atk. 572. (*i*) 1 P. Will. 86. 3 Atk. 581. 3 Veſ. Jun. 493.

It will occur from the Peruſal of this Caſe, that the Teſtatrix did not inſert the Words *Executors or Adminiſtrators* as uſual Words of Annexation, but as ſignificant of a Claſs of Perſons diſtinct from *B*, who were to take the Legacy upon *B*'s dying before her; for the Teſtatrix having expreſsly declared *that none of the Legacies ſhould lapſe*, then proceeds *eodem flatu* to give the Legacy to *B*, her *Executors or Adminiſtrators*, thereby intending to ſubſtitute them in the Place of *B* upon the Event's happening which ſhe had firſt deſcribed. But in the two other Caſes, no ſuch Inference of Intention could ariſe from any Expreſſions made uſe of prior or ſubſeqnent to the Bequeſts made to the Legatees, *their Executors or Adminiſtrators*, which latter Words ſeem to have been introduced without any particular Meaning, and purely as of Courſe.

This general Rule of Equity relating to Lapſes is alſo the ſame, whether the Legacy be given under a Will made by Virtue *of Ownerſhip flowing originally from the Teſtator*, or whether it be bequeathed *under a Power created for the Purpoſe*; for in the latter Caſe, although the Legatee will take under the Authority of the Power, yet he will not be conſidered as taking *from the Time of its Creation*, ſo as to prevent a Lapſe occaſioned by the Death of the Legatee before the Appointor, when the Power is executed by Will.

Will. To this Purpoſe are the Caſes of (*j*) Oke *v.* Heath, and the (*k*) Duke of Marlborough *v.* Godolphin.

If a Legacy be given to two Perſons *jointly*, although one of them die in the Teſtator's Life-time, yet his Intereſt in the Legacy will not be conſidered as lapſed, but will ſurvive to the other joint Legatee. In deciding thus, Courts of Equity differ from the Practice of the eccleſiaſtical, where Survivorſhip in joint Bequeſts is never allowed. See the Caſes of (*l*) Humphrey *v.* Taylor, and (*m*) Morley *v.* Bird.

This Exception to the general Rule relating to lapſed Legacies, originates from the Nature of the Intereſts which joint-Legatees take in the Fund bequeathed. Joint Legatees do not take an Intereſt *per my* only, but *per my & per tout*; therefore if upon any Event one Joint-Legatee is deprived of taking the Intereſt intended, the Intereſt of the other, which extended *per tout*, and was undivided, becomes abſolute in ſuch Joint-Legatee's Share. A Diſtinction has been attempted between joint Bequeſts of *perſonal Property*, and joint Deviſes *of Lands*, upon the Ground that Courts of Equity ought in the firſt Caſe to follow the

(*j*) 1 Veſ. 135. (*k*) 2 Veſ. 61. (*l*) Ambl. 137. (*m*) 3 Veſ. Jun. 628.

Rules

Rules of the eccleſiaſtical, which (as before obſerved) has a concurrent Juriſdiction with them in legatory Matters, according to the Rules of which Courts, Survivorſhip amongſt Joint-Legatees is not allowed. But that ſuch a Diſtinction has never prevailed, appears as well from the Caſes before referred to, as thoſe alſo of (*n*) Cox *v.* Quantock, (*o*) Shore *v.* Billingſly, (*p*) Webſter *v.* Webſter, and (*q*) Cray *v.* Willis.

In Caſes where the Legatees take as *Tenants in common*, with a Bequeſt over *to the Survivors* upon the Event of any of them dying within a fixed Period, although ſome of the Legatees happen to die before the Teſtator, yet the Legacies ſhall go to the Survivors under the *Bequeſt to Survivors*, on the Ground of ſuch Bequeſt over being conſidered as an original and ſubſtantive Bequeſt, to take Place upon the happening of the Event deſcribed; (*r*) Welling *v.* Baine, (*s*) Scoolding *v.* Green, (*t*) Rheeder *v.* Ower, and the other Caſes *in Notis* (*u*).

The Caſe, indeed, of (*v*) Rider *v.* Wager, ſo far as it relates to this Subject, appears to militate againſt the Propoſition laſt mentioned; but the Rule ſeems to be ſettled as above ſtated by the ſeveral Caſes before referred to.

(*n*) 1 Ch. Ca. 238. (*o*) 1 Vern. 482. (*p*) 2 P. Will. 347 (*q*) Ibid. 529. (*r*) 3 P. Will. 113. (*s*) Ch. Pre. 37. (*t*) 3 Bro. C. C. 240. (*u*) 2 Vern. 207, 611. 1 P. Will. 274. Ch. Pre. 471. Moſ. 319. (*v*) 2. P. Will. 328.

MAR-

MARSHALLING OF ASSETS.

WITH reſpect to the marſhalling of Aſſets, we may obſerve that it is the conſtant Object of a Court of Equity to ſecure to Perſons having *equal* Claims upon the Aſſets of Teſtators, a Satisfaction of ſuch Claims, by diſtributing the Funds amongſt them in ſuch a Manner as will moſt effectually anſwer that End, without ſuffering one Claſs to be more injured than another, when there is a Deficiency to pay all. With this View the Court has laid down a Rule, that when a Creditor has the Option of reſorting to both the real and perſonal Aſſets for a Satisfaction of his Debt, and a Legatee has the Power only of reſorting to the latter for Payment of his Demand, if there be a Deficiency of the perſonal to pay both of them, the Court will ſo *marſhal* or *arrange* the different Eſtates, as to confine the Creditor to the real (if ſufficient) for a Satisfaction of his Debt, in order that the perſonal Eſtate may be left diſencumbered, to anſwer the Demand of the Legatee; or in Caſe ſuch Creditor ſhall have received Payment of his Debt out of the perſonal Aſſets, then the Court will, upon proper Application, permit

permit the Legatee to ſtand in the Place of the Creditor, to receive Satisfaction out of the real Eſtate, to the Amount of what ſuch Creditor was paid out of the perſonal Fund. See the Caſes of (*w*) Lutkins *v.* Leigh, (*x*) Hanby *v.* Roberts, (*y*) Foſter *v.* Cook, and the ſeveral other Caſes referred to in the Notes (*z*).

Specific and *pecuniary* Legatees are upon the ſame Footing as to this Matter; and it ſeems that the former are intitled to ſimilar Equity againſt *Executors* and *reſiduary Legatees*, in Caſes where there is no Deficiency of Aſſets; for if the Creditor apply the Subject of the ſpecific Bequeſt in Satisfaction of his Debt, the Executor, or reſiduary Legatee, will be obliged to make the ſpecific Legatee a Recompence out of the general Aſſets, as they can have nothing to their own Uſe but the Reſidue *after* Debts and *Legacies paid*; (*a*) Bowman *v.* Reeve. But the Court will not permit a *pecuniary* Legatee to make Uſe of the Security of a Specialty Creditor, in order to obtain Payment, out of the real Eſtate, of Money received by ſuch Creditor out of the perſonal Fund, when ſuch Permiſſion would tend to the Diſadvantage of a *ſpecific Deviſee* of Lands, for that would be giving to

(*w*) Forreſt. 53. (*x*) Ambl. 127. (*y*) 3 Bro. 347. (*z*) Ch. Pre. 577. 2 P. Will. 81. 190. 3 P. Will. 323. 2 Atk. 446. 3 Atk. 272. (*a*) Ch. Pre. 577.

the pecuniary Legatee a greater Benefit than he is intitled to from the Nature of his Legacy. To this Purpoſe are the Caſes of (*b*) Herne *v.* Meyrick, (*c*) Clifton *v.* Burt, and (*d*) Forreſter *v.* Leigh.

When *the Equities of the Legatees are equal*, the Court of Chancery will not interfere in Favour of any of them; as in Inſtances where there are two Legatees, and both their Legacies are ſpecific, the one being of perſonal Property, and the other of real Eſtate; and a Creditor who has a Claim upon both Funds, takes the whole of his Debt out of the perſonal Eſtate ſpecifically bequeathed, the Court will not permit the ſpecific Legatee to make Uſe of the Creditor's Security to charge the *Lands deviſed* with any Part of the Debt for the Benefit of the ſpecific Legatee; for the Deviſee of the Land is as much a ſpecific Deviſee, as the Legatee is of the perſonal Eſtate; therefore the one has no greater Claim to the Aid or Interference of the Court than the other. This Point was the Subject of the fifth Reſolution in the Caſe of (*e*) Haſlewood *v.* Pope, ſee alſo (*f*) Neal *v.* Mead.

The natural Fund for the Payment of Debts is the perſonal Eſtate, and the Heir or Deviſee

(*b*) 1 P. Will. 201. (*c*) Ibid. 678. (*d*) Ambl. 171.
(*e*) 3 P. Will. 324. (*f*) 1 P. Will. 693.

of

of the *real*, is in general intitled to have the perſonal Eſtate applied to exonerate Incumbrances affecting the former. But the Court of Chancery will not permit any ſuch Arrangement to take place, when it would defeat Legatees of their Legacies. Thus, if it ſhould happen that the perſonal Eſtate was inſufficient to pay the ſeveral Legacies bequeathed, the Heir or Deviſee would not be entitled to have real Incumbrances paid out of that Fund to the Diſappointment of general pecuniary Legatees; (*g*) Lutkins *v.* Leigh. And the other Caſes referred to in the Notes (*h*).

It is a Maxim that "Equality is Equity."—The Court of Chancery therefore, in Compliance with it, has formed a Rule, that when Aſſets are purely *equitable*, they ſhall be diſtributed amongſt Perſons having Claims upon them in equal Proportions, without any Reſpect to the Nature of ſuch Demands, or the Manner in which they are ſecured. Thus, if Lands are given *to Truſtees in Truſt to ſell and pay Debts*, the Aſſets being *equitable*, Debts of every Deſcription will be directed to be paid *pari paſſu*; (*i*) Lewin *v.* Okeley, and (*j*) Plunket *v.* Penſon.

(*g*) Forreſt, 53. (*h*) 1 P. Will. 730. 2 P. Will. 335. (*i*) 2 Atk. 50. (*j*) Ibid. 290.

Aſſets

Aſſets were formerly conſidered as *equitable*, when the Deſcent to the Heir of the *legal* Eſtate in Lands was interrupted by a Deviſe of it to Truſtees, ſo that the Interpoſition of a Court of Equity was neceſſary to ſubject them to the Demands of Creditors. It has, indeed, been a *vexata Quæſtio*, whether a Deviſe to the *ſame* Perſons to ſell, who were alſo appointed *Executors*, conſtituted the Aſſets *legal* or *equitable*; but it ſeems to be now ſettled, that whether the Deviſee be *Executor* as well as *Truſtee*, or whether a bare *Power* be only given him *to ſell*, or whether the Eſtate *be ſuffered to deſcend to the Heir* affected with a *Charge only to pay Debts*, the Aſſets will, in all ſuch Caſes, be conſidered as *equitable*. See the Caſes of (*k*) Challis *v.* Caſborn, (*l*) Newton *v.* Bennet; Hargrave *v.* Tindal; and Silk *v.* Prime, cited in the Notes to the Caſe of Newton *v.* Bennet, (*m*) Batſon *v.* Lindegreen.

It is preſumed, however, that the Equality of Diſtribution which prevails in the Adminiſtration of *equitable* Aſſets, is applicable only when the *Equities* of the ſeveral Parties are *equal*, as amongſt *Creditors*; therefore, if the Truſt be expreſſed to pay *Legacies* as well as Debts, the Satisfaction of the former will be poſtponed to

(*k*) Ch. Pre. 407. (*l*) 1 Bro. C. C. 135. (*m*) 2 Bro. C. C. 94.

the

the Payment of the latter. There is, indeed, an anonymous Caſe reported in Vernon *(n)*, which denies the Exiſtence of any ſuch Diſtinction when the Aſſets are equitable, and there are ſeveral *Dicta* in other Caſes (*o*) correſponding with it. There are two Caſes however determined in Favour of the Priority of the Creditors, *viz.* Sir John Bowle's Caſe (*p*), determined upon a Re-hearing by Lord Nottingham, in which he reverſed the Decree pronounced by Lord Keeper Bridgman in Favour of a Diſtribution amongſt the Creditors and Legatees *indiſcriminatè;* and declared it to be his Opinion, "that in the Caſe of a Truſt "for the Payment of Debts and *Legacies*, "the Debts ought to be preferred and ſa-"tisfied before the Legatees ſhould have the "Benefit of the Truſt." Lord Harcourt alſo pronounced a ſimilar Decree in the Caſe of Petre *v.* Bruen, ſtated in the Caſe of *(q)* Walker *v.* Meager.

If Legacies are made effectual Charges upon the *real Eſtate*, and afterwards other Legacies are given by Codicil bequeathed out of the *perſonal only*, upon a Deficiency of the latter, to pay both Sets of Legacies, the Court of Chancery will confine thoſe given by

(*n*) 2 Vol. 133. (*o*) Ibid. 405. 2 P. Will. 551. (*p*) Cited by Lord Commiſſioner Hutchins, in Greaves *v.* Powell, 2 Vern. 248. (*q*) 2 P. Will. 551.

the

the Will to the *real Eſtate alone*, in Order that the perſonal Eſtate may be left diſengaged as much as poſſible for Payment of the Legacies bequeathed by the Codicil. See the Caſes of (*r*) Maſters *v.* Maſters; and (*s*) Bligh *v.* the Earl of Darnley.

We muſt alſo take Notice, that in thoſe Inſtances before mentioned, in which the Court of Chancery permits Legatees to ſtand in the Place of Creditors who have received their Debts out of the perſonal Eſtate, ſuch Legatees can be intitled to no greater Privilege or Advantage than the Creditors themſelves would have been intitled to from the Nature of their Security. Therefore, if a Creditor could not under his Contract affect the real Aſſets in the Hands of the Heir or Deviſee with the Payment of his Debt, a Legatee who purely ſtands in his Place, and upon the ſame Terms, cannot be in a better Situation; which is the Caſe with all Debts by *ſimple Contract*, or *by Specialty*, when the *Heir is not bound by the Contract*; (*t*) Lacam *v.* Mertins, and the Caſe referred to (*u*).

It appears to be now ſettled, that the Court of Chancery will not marſhal Aſſets in any Caſe

(*r*) 1 P. Will. 421. (*s*) 2 P. Will. 619. (*t*) 1 Veſ. 312. (*u*) 2 Bro. C. C. 107.

but when the Legatees, *at the Time of their Legacies becoming due*, have an eſtabliſhed Claim *diſtinctly and ſolely* upon the *perſonal Eſtate*; therefore, if a Legatee has a Claim at the Teſtator's Death upon both the real and perſonal Aſſets for Payment of his Legacy, but, by ſome ſubſequent Event, as the Death of the Legatee before the Time of Payment, the Remedy upon the real Eſtate is defeated, the Court will not marſhal the Aſſets in Favour of the Legatee's Repreſentative, ſo as to preſerve a perſonal Fund for Payment of the Legacy. See the Caſe of (*v*) Browſe *v.* Abingdon. Lord Hardwicke, indeed, ſeems to have altered his Opinion in that of (*w*) Reyniſh *v.* Martin. But the Rule, as above ſtated, has been again revived by Lord Loughborough's Deciſion in the Caſe of (*x*) Pearce *v.* Loman.

The Court has alſo refuſed to marſhal Aſſets in Favour of *Legacies bequeathed to charitable Uſes*, as that would be conſidered a Mean to evade the Statute of Mortmain; and to effect in Subſtance a Charge upon the Land within the Spirit of that Act. Lord Hardwicke appears to have made the firſt Deciſion againſt marſhalling Aſſets in thoſe Inſtances in the Caſe of (*y*) Mogg *v.* Hodges. This Point came be-

(*v*) 1 Atk. 486. (*w*) 3 Atk. 330. (*x*) 3 Veſ. Jun. 135. (*y*) 2 Veſ. 52.

fore

fore the Court in the Caſes of (*z*) Attorney General *v.* Tyndall, *(a)* Forſter *v.* Blagden, and (*b*) Hillyard *v.* Taylor, in which the Decrees were uniform in refuſing to marſhal Aſſets in Favour of the Charities.

(*z*) Ambl. 614. (*a*) Ibid. 704. (*b*) Ibid. 713.

REPETITION OF LEGACIES.

IT has been a *vexata Quæſtio* with Reſpect to what ſhould be conſidered as a mere Repetition of Legacies, when two or more were bequeathed to the ſame Legatee, by the *ſame Will*, or by *different Inſtruments*. The Queſtion, however, appears to be at preſent in ſome Degree ſettled, and the following Rules may be extracted from the ſeveral Caſes determined upon the Subject.

FIRST, With Regard to Legacies repeated in the ſame Will.

When Legacies are repeated in the ſame Will, being of *equal Amount*, and are given for the *ſame Cauſe*, or *no additional Reaſon* is aſſigned for the ſecond Bequeſt, the Court of Chancery has in thoſe Inſtances inferred an Intention in the Teſtator to give to the Legatee *one Legacy* only; which Adjudication is alſo agreeable to the

the civil Law. See the Caſes of (*a*) Garth *v.* Meyrick, and Greenwood *v.* Greenwood, cited in a Note to the firſt Caſe, (*b*) Holford *v.* Wood.

But if the Legacies *differ in Amount*, or if either of them be *contingent*, ſuch Legacies will not be conſidered as *repeated* only, but *accumulative*. To this Purpoſe ſee the Caſes of (*c*) Curry *v.* Pile, and (*d*) Hodges *v.* Peacock.

SECOND, As to Legacies bequeathed *by Will and Codicil* to the ſame Perſon.

When Legacies are bequeathed by Will and Codicil to the ſame Perſon, whether they be of *greater, equal, or leſs Values*, ſuch Legacies will be conſidered, *primâ Facie*, as diſtinct Gifts, and *accumulative*, each Inſtrument being preſumed to ſpeak for itſelf. And the Court has ſaid upon thoſe Occaſions, "That there is, "*primâ Facie*, no Reaſon why the ſecond In-"ſtrument ſhould be made, unleſs the Intention "was *to add to the firſt*:" and with this agrees the civil Law. See the Caſes of (*e*) Maſters *v.* Maſters, and (*f*) Hooley *v.* Hatton.

(*a*) 1 Bro. C. C. 30. (*b*) 4 Veſ. Jun. 76. Swinb. Part 7, Sect. 20, Page 526; and Sect. 21, Page 530. (*c*) 2 Bro. C. C. 225. 3 Veſ. Jun. 735. (*d*) 1 Ch. Ca. 301. (*e*) 1 P. Will. 421. (*f*) 1 Bro. C. C. 390, in Notis. Swinb. Part 7, Sect. 21, Page 530.

From a like Inference of Intention, if Legacies given by Codicils to the ſame Perſons as are named in the Wills, are mentioned to be given for a *particular Reaſon or Purpoſe*, ſuch Legacies will be conſidered as accumulative; (*g*) Ridges *v.* Morriſon. And, upon the ſame Principle, when the Proviſions in the Will and Codicil are *non ejuſdem Generis*, as when the one is given as a *pecuniary Legacy*, and the other by Way of *Annuity*, both Proviſions muſt be ſatisfied. See the Caſe of (*h*) Maſters *v.* Maſters.

The above Rules of the Court of Chancery, being founded purely upon a Preſumption ariſing from Facts, may be repelled by parol Evidence, ſhewing an Intention in the Teſtator inconſiſtent with the Inference; but the *Onus* of making out ſuch Proof is thrown upon the Executor, and not upon the Legatee (*i*). And if any internal Evidence can be collected from the ſecond Inſtrument indicative of an Intention in the Teſtator *inconſiſtent* with the Preſumption of the ſecond Gift being *accumulative*, as when the Codicil is a *ſimple Repetition* of the Will, with a ſmall Variation, *as the Addition of a Legacy or two*, or when it appears that the latter Inſtru-

(*g*) 1 Bro. C. C. 389. (*h*) 1 P. Will. 421. (*i*) 1 Bro. C. C. 393.

ment

ment was made for the Purpoſe of explaining, or better aſcertaining the Legacies bequeathed by the former; in theſe and the like Caſes the Preſumption in Favour of *double Legacies* will be removed. In Support of theſe Propoſitions ſee the Caſes of (*k*) Duke of St. Albans *v.* Beauclerk, (*l*) Campbell *v.* Radnor, (*m*) Coote *v.* Boyd, (*n*) Barclay *v.* Wainwright, (*o*) Moggridge *v.* Thackwell, and (*p*) Allen *v.* Callow.

(*k*) 2 Atk. 636. (*l*) 1 Bro. 271. (*m*) 2 Bro. 521. (*n*) 3 Veſ. Jun. 462. (*o*) 1 Veſ. Jun. 464. (*p*) 3 Veſ. Jun. 289.

ON THE EXPOSITION OF SOME FAMILIAR WORDS WHICH OCCUR IN TESTAMENTS.

COURTS of Equity having a concurrent Juriſdiction with the eccleſiaſtical in legatory Matters, and the latter Courts having adopted the Roman canon Law, as the Baſis of their Determinations, the former have therefore, for Conformity's Sake, paid Reſpect to that Law, and admitted its Authority in Queſtions ariſing upon perſonal Bequeſts; which Circumſtance will make it neceſſary to refer occaſionally to that Code, relative to the Subject of the preſent Chapter.

Goods.

Goods is *Nomen generaliſſimum*, and, according to the canon Law, will include the whole perſonal Eſtate of a Teſtator, as Bonds, Notes, Money,

Money, &c. (*a*) Its extenſive Import, however, has been reſtrained by Courts of Equity, when, from the Nature of the Property bequeathed, or from a manifeſt Inference collected from the Will, it has appeared that Teſtators made Uſe of the Word in a narrower Senſe than it legally bore (*b*). Thus, if a Perſon have houſhold Goods and Furniture *of his own*, and other Goods and Furniture *in the Way of Trade*, and bequeaths *all his houſhold Goods and Chattels*, thoſe only made uſe of by him for the Purpoſes of his Houſe will paſs by the Terms of the Legacy; as appears from the Caſe of (*c*) Jackſon *v.* Pratt; neither will ſuch Articles of perſonal Property paſs under this general Bequeſt, *whoſe Enjoyment is in their Conſumption*, as *Victuals*, *Wine*, *Corn*, &c. (*d*); nor Caſh, when a Money Legacy has been previouſly bequeathed to the ſame Legatee (*e*). We muſt obſerve, however, that, it is an eſtabliſhed Rule of Conſtruction, that in general, expreſs Words of a known and determinate Meaning, are not to be narrowed in their legal Import by others which raiſe a Suſpicion, or Probability *only*, that the Teſtator adopted ſuch prior Words in a more confined Senſe than they uſually bear; but that in all ſuch Caſes

(*a*) Swinb. Part 7. Sect. 10. (*b*) 1 Veſ. 273. 1 P. Will. 267. Ambl. 612. (*c*) 3 Brown, P. C. 199. (*d*) 3 P. Will. 334. (*e*) Pre. Ch. 8.

the

the Inference or Implication muſt be ſtrong, clear, and ſatisfactory (*f*).

Although Bonds (as is before mentioned) are included in the general Term Goods, yet if the Mode of bequeathing by this Term *ſavour of Locality*, as where the Bequeſt is made of Goods in a *particular Place*, or *Houſe*, Bonds, and other Securities for Money, which may be found there, will not paſs, as they are conſidered to have *no Locality*. Bank Notes, however, muſt be excepted, as they are conſidered *quá* Money; and to this Effect are the Caſes of (*g*) Chapman *v.* Hart, (*h*) Moore *v.* Moore, Green *v.* Symonds, cited in a Note to the Caſe laſt referred to, and Jones *v.* Sefton (*i*).

Upon the ſame Principle of implied Intention, the general Import of the word *Goods* has been confined to Species of perſonal Property mentioned in the ſame Will. Thus, in Caſes where Goods of a *particular Kind* are mentioned in a Teſtament, as *houſhold* Goods and Furniture, and *other Goods;* by the latter Phraſe, *other Goods*, Money, Bonds, &c. will not paſs, but ſuch perſonal Property only as is of a Nature ſimilar to that previouſly deſcribed; which Rule of Conſtruction ſeems to have pre-

(*f*) 3 P. Will. 121. 1 Veſ. Jun. Ch. Ca. 268. (*g*) 1 Veſ. 271. (*h*) 1 Brown, Ch. Ca. 127. (*i*) 4 Veſ. Jun. 166.

vailed

vailed in the Caſes of (*k*) Trafford *v.* Berrige, (*l*) Woolcomb *v.* Woolcomb, (*m*) Timewell *v.* Perkins, (*n*) Roberts *v.* Kuffin, and Crichton *v.* Symes (*o*).

In thoſe Inſtances where the Bequeſt is general of *all* the Teſtator's *Goods*, or of ſuch Goods as are *collective* and *changeable*, the Legacy will include as well ſuch Part of the Teſtator's perſonal Eſtate as was acquired *after the Date and making of his Will*, as ſuch Part of it as was poſſeſſed by him at that Period; and for this Reaſon, becauſe ſuch Eſtate is fluctuating and uncertain prior to the Time of his Deceaſe; but the general Rule, in Regard to Teſtaments is, that the Date of them, and not the Time of the Teſtator's Death, is to be attended to (*p*).

It appears to have been the Law of the Court of Chancery at an early Period, before Plate was in common Uſe, that it ſhould not be conſidered as included in a general Bequeſt of *houſhold Goods* or *Furniture*; but ſince that Period, as the Nation grew richer, and Plate came more into Uſe, the Law of the Court altered by Degrees; and it ſeems to be

(*k*) 1 Eq. Ab. 201. pl. 14. (*l*) 3 P. Will. 111. (*m*) 2 Atk. 104. (*n*) Ibid. 113. (*o*) 3 Atk. 61. (*p*) 2 Vern. 688. 1 P. Will. 424. Ibid. 575. Ibid. 597. Ambl. 280.

now

now ſettled, that Plate will be included under thoſe general Words, and that parol Evidence of a contrary Intention will not be admitted. To this Effect are the Caſes of (*q*) Franklyn *v.* Counteſs of Burlington, (*r*) Lillcott *v.* Compton, (*s*) Maſters *v.* Maſters, (*t*) Nicholls *v.* Oſborn, and Snelſon *v.* Corbet (*u*). It alſo appears, from the Caſes laſt referred to, that the Circumſtance of the Plate being in common Uſe, was thought material; but in a ſubſequent Caſe of (*v*) Kelly *v.* Powlet, the Maſter of the Rolls denied that it was of any Conſequence whether the Plate was in common Uſe or not, provided that it was ſuitable to the *Situation* and *Quality* of the Teſtator; and that if a Perſon of *high Rank* buy ever ſo large a Quantity of Plate, the ſame would paſs under a general Bequeſt of houſhold Goods or Furniture, although ſeldom or never uſed. But that if a *Merchant* or *Tradeſman* buy a Service of Plate at a cheap Price, with a View to make Profit of it by Sale, ſuch a Service would not paſs under the general Bequeſt, although occaſionally made uſe of.

Furniture.

By the Term *houſhold Furniture*, every Thing is included which may contribute to the Uſe

(*q*) 2 Vern, 512. (*r*) Ibid. 638. (*s*) 1 P. Will. 425. (*t*) 2 P. Will. 419. (*u*) 3 Atk. 370. (*v*) Ambl. 605.

or

or Conveniency of the Houſholder, or the Ornament of the Houſe, as Plate, Linen, China both uſeful and ornamental, and Pictures (*w*). But Libraries of Books will not be conſidered as compriſed within this Term, as they are more properly applicable to the *Entertainment* of the Mind, than for Uſe and Ornament as Furniture; and to this Purpoſe are the Caſes of (*x*) Bridgman, *v.* Dove, (*y*) Kelly *v.* Powlet, and Porter *v.* Tournay (*z*).

Chattels.

According to Sir Edward Coke's Etymology (*a*) of the Term *Chattels*, it is of French Derivation, and ſignifies Goods; but Blackſtone, Juſtice, in his Commentaries on the Laws of England (*b*), prefers the Derivation of it from the technical Latin Word *Catalla*, which primarily ſignifies only Beaſts of Huſbandry, or *Cattle;* but in its ſecondary Senſe, was applied to all Moveables generally. He alſo obſerves, that in the Grand Conſtumier of Normandy (*c*), a Chattel is deſcribed to be a mere Moveable; but, at the ſame Time, is ſet in Oppoſition to a Fief or Feud, ſo that it compriſed not only Goods, but whatever was not a Feud (*d*). Now a Feud or Fief con-

(*w*) Ambl. 605. 2 Veſ. 279. (*x*) 3 Atk. 202. (*y*) Ambl. 605. (*z*) 3 Veſ. Jun. Ch. Ca. 311. (*a*) 1 Inſt. 118. b. (*b*) 2 Vol. page 385. (*c*) Cap. 87. (*d*) Fol. 107. a.

ſiſted

ſiſted of two Requiſites, *viz. Immobility*, and *unlimited Duration* as to Time; from whence it follows, that whatever Species of Property wanted either of thoſe Qualities, was not a Feud or Fief, and according to us is not a *real* Eſtate; for our Law has annexed the ſame extenſive Meaning to the Word Chattels as the Norman Law has done; ſo that whatever Property does not fall within the Deſcription of a Fief or real Eſtate, muſt neceſſarily be either perſonal Eſtate or *Chattels*. From the above Definition of the Term *Chattels*, it naturally occurs that their Diviſion muſt be twofold, *viz.* into Chattels *real*, and Chattels *perſonal* (*e*). The *former* are ſuch Intereſts created in Lands as want the unlimited Duration before mentioned, as Terms for Years, Eſtates by Statute Merchant, &c. The *latter* conſiſts of pure moveable Property, as Goods, Money, and the like; from which Premiſes we may infer, that a Bequeſt of all the Teſtator's Chattels generally, will be competent to paſs not only his moveable or perſonal Property, but alſo all ſuch Intereſts in Lands as he may be entitled to, which are *leſs than Freehold* (*f*).

Things Moveable.

Although the civil Law, in Regard to Things *moveable*, made a Difference between *moventia*

(*e*) 1 Inſt. 118. (*f*) Swinb. Part 7. Sect. 10, page 475.

and *mobilia* (*g*), conſidering the former Term to compriſe ſuch Goods as were endued with ſpontaneous Motion, as Horſes, &c. and the latter, thoſe Things only which were capable of *Loco-motion*, as Furniture, Carriages, &c. yet that Diſtinction does not exiſt with us; wherefore, under a Bequeſt of all the Teſtator's *Moveables*, his perſonal Eſtate, both quick and dead, will paſs to the Legatee (*h*). It has been alſo a *vexata Quæſtio* amongſt the Civilians, whether *Corn ſtanding* at the Teſtator's Death, ought to be conſidered as a Part of his *moveable* Property. By the Laws of England (*i*), however, it is clear that Corn growing at that Period will be conſidered to conſtitute a Part of his moveable Eſtate, and capable of Diſpoſition by Teſtament; as is alſo ſuch other Produce of the Earth which is not an annual natural Production, but occaſionally yielded by it through the Induſtry and Labour of Man; excepting only thoſe Caſes where the Act of ſowing the Corn, or other occaſional annual Produce, is imputable to Teſtators, as Folly or wilful Imprudence (*k*). As if a Leſſee for Years ſow his Lands juſt before the Expiration of the Term, againſt which Period it was not poſſible that it could be ripe and proper to be cut down; in this Inſtance, as the

(*g*) Ibid. page 476. (*h*) Ibid. page 478. (*i*) 2 Black. Comm. 122. (*k*) Ibid. Swinb. 123, Part 3. Sect. 6.

Teſtator,

Teſtator, if living, would not be permitted to gather his Corn, neither ſhall his Legatee, who muſt claim under him.

Things Immoveable.

By the Term *Immoveables*, or *immoveable Goods*, Property conſidered as Chattels real, will paſs to the Legatee, as Leaſes, &c. and alſo the *natural* Fruits of the Earth, as Graſs growing, Fruit on the Trees, and the like; which being the annual and natural Produce of the Ground, without any further or other material Aid from Man's Labour, than the firſt ſowing and planting, are denominated Part of his Chattels *real*, and will paſs by ſuch Words only as are competent to embrace that Kind of Property (*l*). According to the Majority of the Writers on the civil Law, Debts due to the Teſtator would not be conſidered as included under a Bequeſt of *Moveables* or *Immoveables* (*m*); and for *three* Reaſons, firſt, becauſe Debts differed from Things moveable and immoveable *in Subſtance*, as they were incapable of, and admitted no Diviſion. Secondly, becauſe Debts differed from ſuch Goods in their *Nature*, as the latter admitted of actual Poſſeſſion, of which Choſes in Action (as Debts are) were conſidered as incapable; and laſtly, becauſe Debts differed from ſuch

(*l*) Swinb. Part 7. Sect. 10. page 478. (*m*) Ibid. 481.

Goods

Goods *in Effect*, inaſmuch as the one being corporeal, might be preſcribed in a ſhorter Time than the other, which were incorporeal (*n*). But whatever may have been the Conſequence of the ſubtile Diſquiſitions of learned Civilians upon this Subject, it ſeems that our municipal Law has included Debts due to the Teſtator amongſt his *moveable* and *immoveable* Eſtate, paying more Regard to the Intention of Teſtators, whoſe Meaning is, moſt likely, to include under thoſe Terms every poſſible Deſcription of their perſonal Eſtate, than to legal Properties or Effects attaching to any Species of it, which Teſtators are preſumed to know but little of. Moreover, the above Reaſons aſſigned by the Writers on the civil Law for not including Debts amongſt *moveable* and *immoveable* Property are open to Objection, inaſmuch as Debts are capable of being reduced into Poſſeſſion, and may be the Subjects of Diviſibility in like Manner as any other Species of perſonal Eſtate.

Houſhold Stuff.

By the Term *houſhold Stuff*, every Thing will paſs to the Legatee, which may be uſed

(*n*) Ibid. page 483.

for the Conveniency of the Houſhold, as *Tables, Chairs, Bedding, and the like (o)*; but Apparel, Books, Cattle, Victuals, &c. which are not neceſſary for *permanent Enjoyment* in the Houſe, or which, from their Nature, cannot be compriſed within the Term without a Violation of its general Import, will not be included in, or paſs by thoſe Words. And as to the Incluſion of Plate under this Term, the like Obſervations appear applicable with Regard to it as have been made before in this Chapter as to its paſſing under the Word *Goods*.

Medals.

With Reſpect to what ſhall paſs to Legatees under Bequeſts of *Medals*, beſides Pieces of Metal anſwering the literal Deſcription, it ſeems that if *current Coin* are *curious* Pieces, and are uſually kept with Medals, ſuch Coin will alſo paſs with them under this Deſcription, inaſmuch as Medals themſelves were once current Coin. And to this Effect Lord Hardwicke expreſſed himſelf in the Caſe of Bridgman *v.* Dove (*p*).

(*o*) Swinb. Part 7. Sect. 10. page 484 (*p*) 3 Atk. 201, 2.

Item.

Item.

The Word *Item*, which frequently occurs in Teſtaments, is to be conſtrued as a *Conjunctive* in the Senſe of *and* or *alſo*, ſo as to connect Sentences. Therefore, if *A* bequeath a Legacy to *B*, *Item* a Legacy to *C*, payable out of a particular Fund, *B*'s Legacy, as well as *A*'s, will be a Charge upon the ſame Property; Cheeſeman *v.* Partridge (*q*).

(*q*) 1 Atk. 436.

CONSTRUCTION OF BEQUESTS.

Of Joint Tenancy, and Tenancy in common, in perſonal Bequeſts.

WHEN Legacies are given to two or more Perſons in undivided Shares, as 100*l. to A and B, or to the Children of C*, the Legatees will take as joint Tenants (*a*). But when Legacies are given in *divided Shares*, as ſo much of a Sum of Money to *B* and ſo much to *C*, the Legatees will be conſidered as *Tenants in common.* Thus a Legacy bequeathed to two or more Perſons, *Share and Share alike*, or *equally to be divided between or amongſt them*, or *to and amongſt them*, will create a Tenancy in common.—See the Caſes of (*b*) Owen *v.* Owen, (*c*) Shepherd *v.* Gibbons, (*d*) Joliffe *v.* Eaſt, (*e*) Campbell *v.* Campbell, and Trundell *v.* Eames, cited in the Caſe laſt referred to.

(*a*) 2 P. Will. 347, 529. 4 Bro. C. C. 15. (*b*) 1 Atk. 494. (*c*) 2 Atk. 441. (*d*) 3 Bro. C. C. 25. (*e*) 4 Bro. C. C. 15.

Caſes

Caſes have occurred in which the Determination that the above Words or Expreſſions ſhould create a Tenancy in common, would have ſeemingly involved in it a Contradiction, as in thoſe Inſtances when ſuch Words of Severance occur, and a Bequeſt over to *ſurviving Legatees* is immediately grafted upon them. In thoſe Caſes, the Court of Chancery, in order to give Effect to every Word in the Bequeſt, has conſidered the Words creating the Survivorſhip amongſt the Legatees, as intended to be confined to the Death of the Teſtator; and therefore decreed that the Legatees ſhould be conſidered as *Tenants in common* from that Period, with the Benefit of Survivorſhip in Caſe any of them died *before* the Teſtator. To this purpoſe are the Caſes of (*g*) Bindon *v.* Suffolk, (*h*) Stringer *v.* Phillips, (*i*) Trotter *v.* Williams, (*k*) Stones *v.* Heurtly, (*l*) Roebuck *v.* Dean, (*m*) Perry *v.* Woods, and (*n*) Maberly *v.* Strode. But we muſt obſerve, that confining the Death of the Legatee to that of the Teſtator, is adopted for the Purpoſe only of avoiding a Contrariety apparent upon the Teſtament, and to effectuate the Intention of the Deviſor as far as poſſible. So that this Doctrine is not to be applied to general Caſes; therefore, if a Legacy were given to

(*g*) 1 P. Will. 96. (*h*) 1 Eq. C. Ab. 292. pl. 11. (*i*) Ch. Pre. 78. (*k*) 1 Veſ. 165. (*l*) 2 Veſ. Jun. 265. (*m*) 3 Veſ. Jun. 294. (*n*) Ibid. 451.

A, and in Caſe of his Deceaſe to B, A's Death would not be confined to the Contingency of his dying in the Teſtator's Lifetime, in order to give Effect to the Bequeſt over to *B*; but *A* would be conſidered as taking a Life-intereſt only in the Legacy, and *B* would be entitled to it abſolutely upon the Event of *A*'s Death, whenever it took Place.—See the Caſe of (*o*) Douglas *v.* Chalmers.

The Caſe of (*p*) Brograve *v.* Winder may ſeem to militate againſt the above Doctrine, but it will appear, upon Examination, to have been decided upon particular Circumſtances. The Caſe was in Subſtance as follows: *A* deviſed certain Lands to *B* for Life, and to his Sons ſucceſſively in Tail Male, with Remainder to Truſtees to ſell, and directed that the Money to ariſe from the Sale ſhould be *equally divided between C, D,* and *E, or the Survivors or Survivor of them;* upon a Queſtion when the Intereſts in the Legacies veſted, *B* having died without Iſſue, the Court was of Opinion, that there being no Gift prior to the Time appointed for Payment of the Legacies, they were therefore *contingent* during *B*'s Life, and that the Teſtator muſt have intended by the Terms of his Bequeſt, that all the Legatees, if living at *B*'s Deceaſe, or *ſuch of them as ſhould be then ſurviving,* ſhould be

(*o*) 2 Veſ. Jun. 501. (*p*) 2 Veſ. Jun. 634.

intitled

intitled to the whole Fund bequeathed. Now, it is obſervable in this Caſe, that there was no Neceſſity for the Court to confine the Operation of the Bequeſt "to the Survivors or Survivor of the Legatees," *to the Period of the Teſtator's Death*, as no ſuch Contradiction or Inconſiſtency would enſue from a contrary Adjudication, as muſt unavoidably have been the Caſe if adopted in the ſeveral Authorities before referred to.

We have juſt obſerved, that the Operation of a Bequeſt to *Survivors* grafted upon a *Tenancy in common*, will not be confined to the Period of the Teſtator's Death, if with Propriety it can be extended further: in the following Caſes, therefore, ſuch Bequeſt to Survivors was conſidered as efficient *during the Minority of the Deviſees or Legatees*, inaſmuch as they were not intitled to receive their Legacies before the Age of twenty-one; (*q*) Haws *v.* Haws, (*r*) Mendes *v.* Mendes, and (*s*) Saliſbury *v.* Lambe.

Although the Words *equally to be divided*, and *Share and Share alike*, will create a *Tenancy in common*, yet when it appears from the Context of the Will, that a *Joint Tenancy* was intended, ſuch Words will not be permitted to ſever the In-

(*q*) 1 Veſ. 13. (*r*) 3 Atk. 620. (*s*) Ambl. 383.

tereſts of the Legatees; (*t*) Armſtrong *v.* Elridge.

A Bequeſt to two or more in *joint and equal* Proportions, or *jointly and between them*, the Legatees will take as *Tenants in common*, the Term *joint* or *jointly* not being conſidered as intended to impart a *joint Intereſt* to the Legatees, but to ſignify only a Gift to them *all together*. To this Purpoſe are the Caſes of (*u*) Perkins *v.* Baynton, and (*x*) Ettricke *v.* Ettricke.

The Surviving of accrued Shares.

When *diſtinct* Legacies are given to three or more as *Tenants in common*, with a Bequeſt to the *Survivors*, upon the Death of any of them, within a given Period, it is ſettled that upon the Death of two or more Legatees, the *original* Legacies only (and not thoſe Shares which accrued to them by Survivorſhip) ſhall ſurvive; for ſuch accrued Shares having veſted in the ſurviving Legatees in *diſtinct Portions*, proper Words are neceſſary to make thoſe Shares ſurvive with the original Legacies. See the Caſes of (*y*) Rudge *v.* Barker, (*z*) Barnes *v.* Ballard,

(*t*) 3 Bro. C. C. 215. (*u*) 1 Bro. C. C. 118. (*x*) Ambl. 656. (*y*) Forreſt. 124. (*z*) 3. Atk. 79.

cited

cited in Pain *v.* Benſon, (*a*) *ex Parte* Weſt, and (*b*) Vandergutcht *v.* Blake.

This Rule, however, is much diſapproved of by the Court of Chancery, as an Adherence to it in general is found to diſappoint the Intention of Teſtators, for which Reaſon Lord Hardwicke, in the Caſe of (*c*) Pain *v.* Benſon, endeavoured to make a Diſtinction between that and the other Caſes, and decided that the Word *Share* was ſufficient to include *accruing* as well as *original* Shares; but Lord Thurlow was of Opinion, (*d*) *ex Parte* Weſt, that the Word *Share* did not warrant the Deciſion in the above Caſe of Pain *v.* Benſon, although he coincided with Lord Hardwicke in Diſapprobation of the Rule.

One Exception to this general Rule has prevailed when the Legacies are not given *ſeparately* and *diſtinctly*, but when the Fund is bequeathed as an *aggregate one*, and made diviſible amongſt many Perſons as Legatees, with Benefit of Survivorſhip amongſt them. Thus, where a *Reſidue* was bequeathed in Truſt to be divided amongſt *A*, *B*, and *C*, at their reſpective Ages of twenty-one, with Survivorſhip on the Death of any of them before that Age, it was determined that an *accrued* as well as the *original* Share ſurvived to

(*a*) 1 Bro. C. C. 575. (*b*) 2 Veſ. Jun. 534. (*c*) 3 Atk. 78. (*d*) 1 Bro. C. C. 575.

the

the ſurviving Legatee ; (*e*) Wollidge *v.* Churchhill.

OR *conſtrued* AND, *and* AND OR.

It ſometimes happens that a whole Sentence in a Will is rendered uncertain or unintelligible from the Circumſtance of a Teſtator having made uſe of the Disjunctive *or* when the Copulative *and* ſhould have been inſerted, *et ſic è converſo*, *and* for *or*. The Court of Chancery, however, in order to effectuate the Intention, and give Validity to the Bequeſt, has corrected the miſtake, as appears from the Caſes of (*f*) Richardſon *v.* Spragg, (*g*) Read *v.* Snell, (*h*) Wright *v.* Wright, (*i*) Brownſword *v.* Edwards, (*k*) Furnival *v.* Crew, and (*l*) Framlingham *v.* Brand, (*m*) Haws *v.* Haws, (*n*) Dobbins *v.* Bowman, and (*o*) Maberly *v.* Strode.

Legacies to the Separate Uſe of married Women.

When Legacies are given to married Women, and the Teſtator's Intention appears that their

(*e*) 3 Bro. C. C. 465. (*f*) 1 P. Will. 434. (*g*) 2 Atk. 643. (*h*) 1 Veſ. 411. (*i*) 2 Veſ. 243, 249. (*k*) 3 Atk. 86. (*l*) Ibid. 390. (*m*) 1 Veſ. 13. (*n*) 3 Atk. 408. (*o*) 3 Veſ. Jun. 451.

Huſbands

Huſbands ſhould have no Intereſt in ſuch Bequeſts, the Court of Chancery will convert the Huſbands into Truſtees of the Property for the Benefit of the Legatees, although no Truſtees are appointed in the Teſtaments, Lord Cowper, indeed, in the Caſe of (*p*) Harvey *v.* Harvey, entertained a Doubt, whether a married Woman could take an Intereſt diſtinct from her Huſband without the Intervention of Truſtees; but it ſeems that ſuch Doubt has been ſince removed by the Deciſion of the Maſter of the Rolls in the Caſe of (*q*) Bennet *v.* Davis.

With Reſpect to what Words or Expreſſions will be conſidered as ſufficient to evince ſuch Intention in Teſtators, the following appear to have that effect, *viz.* when it is declared that the *Receipt of the Wife ſhall be a ſufficient Diſcharge to the Executor* for Payment of the Legacy to her (*r*),

Or that the Legacy ſhall be *for her ſole and ſeparate Uſe* (*s*),

Or *for her Livelihood and the like* (*t*).

(*p*) 1 P. Will. 125. (*q*) 2 P. Will. 316. (*r*) 3 Bro. C. 381. (*s*) 3 Atk. 399. (*t*) Lewcaſ. Ch. Ca. 531.

What

What neceſſary to raiſe a Truſt by Implication.

When a Perſon bequeaths Property to another for Life, with a *Recommendation* to the Legatee to diſpoſe of it at his Deceaſe amongſt *various Objects*, ſo that the *Objects*, the *Property*, and *the Way it ſhould go*, are clear, a Truſt will be created by Implication, though imperfectly declared. To this Purpoſe are the Caſes of (*u*) Maſon *v.* Limbury, (*x*) Eales *v.* England, (*y*) Maſſey *v.* Sherman, (*z*) Nowlan *v.* Nillegan, (*a*) Pierſon *v.* Garnet, and (*b*) Malim *v.* Keightley.

It is a Conſequence, therefore, from what has been ſaid, that if the *Object* of the Recommendation *is not aſcertained diſtinctly*, a Truſt for ſuch Object will not ariſe; (*c*) Harland *v.* Trigg.

Neither will a Truſt be created when the Property is not aſcertained, but the Amount is made to depend upon the Will of the firſt Legatee; as when the Quantity of the Fund directed to go over upon the Legatee's Death, is left to *his Diſcretion.* See the Caſes of (*d*) Bland *v.*

(*u*) Cited in Vernon. *v.* Vernon. Ambl. 4. (*x*) Ch. Pre. 200. (*y*) Ambl. 520. (*z*) 1 Bro. C. C. 489. (*a*) 2 Bro. C. C. 38, 226. (*b*) 2 Veſ. Jun. 333 .(*c*) 1 Bro. C. C. 142. (*d*) Finch's Ch. Pre. 201, note.

Bland,

Bland, (*e*) Attorney General *v.* Hall, (*f*) Wynne *v.* Hawkins, (*g*) Sprange *v.* Barnard, and (*h*) Puſhman *v.* Filliter,

Nor when an Inference can be collected from the Will that the Direction or Recommendation was not intended to be *imperative* upon the Legatee; as in the Caſes of (*i*) Bull *v.* Vardy, (*k*) Meggiſon *v.* Moore.

Miſtakes and Uncertainty in the Thing deviſed.

It is neceſſary that the Subject of Bequeſts be properly deſcribed and aſcertained, ſo that the Intention of Teſtators in Regard to it may be apparent; for if the Thing intended to be given be miſnamed, or if the Subject be of *Quantity* and not particularized, the intended Bequeſts will in general be void for Uncertainty; as in Caſes where a Perſon intending to bequeath to

(*e*) Fitz. 314. (*f*) 1 Bro. C. C. 179. (*g*) 2 Bro. C. C. 585. (*h*) 3 Veſ. Jun. 7. (*i*) 1 Veſ. Jun. 270. (*k*) 2 Veſ. Jun. 630.

B an *Ox*, bequeaths to him a *Horſe* (*l*); or meaning to give him a *pecuniary* Legacy, bequeaths to him various Articles of *Apparel*; or if the Terms of a Bequeſt be of the Teſtator's *beſt* Linen to *C* (*m*), in theſe Inſtances the Legacies could not be ſupported. But if a Teſtator miſtook only the *Name* of the Thing intended to be given, and had no other Thing to which the Terms of the Bequeſt could apply, in this Caſe the wrong Deſcription of the Subject of the Bequeſt would not defeat the Legacy; as if a Perſon having one Horſe only, called *Arundel*, bequeaths him to *B*, by the Name of *Bucephalus*, the Bequeſt would be good.

Upon a like Principle of latent Ambiguity, ariſing from the Circumſtance of Teſtator's not poſſeſſing Property anſwering the exact Deſcription of that diſpoſed of, a Perſon bequeathed ſo much *three per Cent. Conſols Bank Annuity* to *B*, without poſſeſſing any ſuch Stock, but having Property to the Amount in *Long Annuities*, parol Evidence would be admitted to ſhew the Miſtake in the Deſcription, and the Bequeſt would be ſupported; to which Purpoſe may be adduced the Caſes of (*n*) Hodg-

(*l*) Touchſt. 432. (*m*) 2 P. Will. 387. (*n*) 2 Vern. 593.

ſon

ſon *v.* Hodgſon, (*o*) Day *v.* Trig, (*p*) Finch *v.* Inglis, (*q*) Selwood *v.* Mildmay, and Dobſon *v.* Waterman, cited in a Note to the laſt Caſe.

And if a Perſon, through Miſtake, miſcalculate the Amount of the Fund intended to be given, as if *A* bequeathed to *B*, a Debt of 200l. due from *C*, when *C*'s Debt amounted to 300l. *B* would be intitled to the *whole* Debt; (*r*) Williams *v.* Williams, and (*s*) Milner *v.* Milner.

Courts of Equity being thus in the Habits of correcting Errors and Miſtakes in Bequeſts, we muſt obſerve, however, that ſuch Miſtakes, when relating to the Rejection of any Words contained in a Teſtament, will not be corrected, unleſs they appear to be ſuch from a fair Inference to ariſe from the Will—(*t*) Philipps *v.* Chamberlaine; for if ſuch Miſtakes be purely *preſumptive* or *conjectural*, and are not inconſiſtent with any Part of the Teſtament, the Court cannot, upon ſo ſlight a Foundation, correct the ſuppoſed Errors, nor admit of *parol Evidence*, to ſhew ſuch Miſtakes; as appears from the Caſes of (*u*) Hampſhire *v.* Peirce, and (*x*) Melliſh *v.* Melliſh.

(*o*) 1 P. Will. 286. (*p*) 3 Bro. C. C. 420. (*q*) 3 Veſ. Jun. 306. (*r*) 2 Bro. C. C. 87. (*s*) 1 Veſ. 106. Swinb. Part 7. Cap. 5. Sect. 13. (*t*) 4 Veſ. Jun. 57. (*u*) 2 Veſ. 216. (*x*) 4 Veſ. Jun. 45.

A Bequeſt

A Bequeſt of a Sum of Money in *Long Annuities*, as of 50l. Long Annuities, will be conſidered as a Legacy of an *annual Sum* to that Amount; (*y*) Stafford *v.* Horton. But if the State of the Teſtator's Property be inconſiſtent with this Conſtruction, that Circumſtance will create ſuch a *latent Ambiguity*, in Regard to the Application of the Words of the Bequeſt, as will let in parol Evidence to ſhew that the Teſtator intended only by ſuch Words to bequeath to the Legateee a *groſs*, inſtead of an *annual Sum* of that Amount; (*z*) Fonnereau *v.* Poyntz.

If a Perſon bequeath to another a ſpecific *indiviſible* Thing, and afterwards, in a ſubſequent Part of the Teſtament, bequeath the ſame Thing to *B*, it ſeems that, in Order to give full Effect to the Legacy, *A* and *B* will be conſidered as *Joint-Tenants* or *Tenants in common* of the Subject bequeathed, according to the Nature of the Bequeſt (*a*).

If a Legacy be given upon Truſt to pay the *Intereſt* or *Produce* to *B*, or *to the ſeparate Uſe of B*, without any Limitation as to Continuance, the abſolute Intereſt in the Principal

(*y*) 1 Bro. 482. (*z*) Ibid. 472. (*a*) Swinb. Part 7, Sect. 21, p. 528.

will be conſidered as equally bequeathed with the Produce of it; (*b*) Elton *v.* Shephard, and (*c*) Philipps *v.* Chamberlaine.

A Bequeſt of ſo much Money due upon a *particular Security*, will paſs the *Principal* only to the Legatee, and no Part of the *Intereſt*, either from the Date of the Will, or the Death of the Teſtator; (*d*) Roberts *v.* Kuffin.

A Legacy to the *Pariſh Church of C*, will be conſidered as a Bequeſt to the *Church-wardens* of *C*, to be applied for the adorning and repairing the Church, and not as a Bequeſt to the *Parſon*; the former being a Corporation for taking *Money* or *perſonal Eſtate* to the Uſe of the Church, the latter a Corporation only to hold *Lands* to ſuch Uſe; (*e*) Attorney General *v.* Ruper.

A bequeathed all his houſehold Goods, Cattle, Corn, Hay, Implements of Huſbandry, and Stock, belonging to his Houſe, Meſſuage, Farm, and Premiſes, which he held *by Leaſe* to his Wife for Life; a *Malt-houſe* being included in the Leaſe, the Stock belonging to it was adjudged to paſs to the Legatee; (*f*) Brookſbank *v.* Wentworth.

(*b*) 1 Bro. C. C. 532. (*c*) 4 Veſ. Jun. 51. (*d*) 2 Atk. 112. (*e*) 2 P. Will. 125. (*f*) 3 Atk. 64.

A bequeathed to ſuch of his *Servants* as ſhould be living with him at his Death one Year's Wages: Upon a Queſtion as to what Claſs of Servants ſhould be comprehended within the Compaſs of the Bequeſt; it was determined, that *Stewards of Courts* and ſuch other Servants who were not obliged to paſs their whole Time in their Maſter's Service, were not Servants within the Meaning of the Bequeſt; (*g*) Townſhend *v.* Wyndham.

Words of *Diminution* are never conſtrued to give a Legacy by *Implication*—therefore, if a Perſon bequeath thus, *out of the* 100*l. which I bequeathed to A, I give to B* 50*l.* the Legacy to *B* is good, notwithſtanding no Bequeſt was made to *A*, as mentioned in the Will; and for the Reaſon before aſſigned, *A* can take Nothing by Implication(*h*).

If a Legacy be given by a Teſtator to the Son of one who is indebted to him, and the Teſtator adds the following Words, *I ſhould or would leave him more if his Father had paid me what he owes me*(*i*), it is held, that if afterwards the Son happen to be his Father's Executor, he will, by theſe Words, be freed from that Debt which his Father owed to the Teſtator.

(*g*) 2 Vern. 546. (*h*) Godolph. 282. (*i*) Ibid. 284.

ON

ON THE SATISFACTION OF DEBTS AND PORTIONS BY LEGACIES.

IT is a general Rule, that when a Perſon indebted to another bequeaths to him *as great or a larger Sum of Money* than the Debt amounts to, without taking any Notice of the Debt, the Legacy will be conſidered as given in Payment or Satisfaction of the Debt; (*a*) Fowler *v.* Fowler, (*b*) Brown *v.* Dawſon, and the other Caſes referred to in the Notes (*c*).

The Principle of this Rule is much diſapproved of by the Court of Chancery, as no ſatisfactory Reaſon can be aſſigned why a Teſtator (when there is no Deficiency of Aſſets) may not intend a Benefit to his Creditor *ultrà* Payment of the Debt, as well as to any other Legatee named in his Will. In (*d*) Haynes *v.* Mico, Lord Thurlow expreſſed himſelf in Relation to

(*a*) 3 P. Will. 353. (*b*) Ch. Pre. 240. (*c*) 1 Veſ. 124, 126. 2 P. Will. 132. Ch. Pre. 394. 2 Vern. 177, 258, 298. (*d*) 1 Bro. C. C. 130.

the Rule to the following Effect: "That the "first Cases upon the Subject were those where "there were Circumstances to shew it to be "*the Testator's Intention* that the Money should "be applied in Payment of the Debt. They "did not rest on the mere Circumstance of "*Equality*. In Equity Cases (Pile *v.* Pile, "1 Eq. Ca. Abr. 204) there is a Case in which "Evidence was admitted to prove the Testa-"tor's Intention to increase the Portion: after-"wards the Cases took a different Turn, be-"cause the declaring it to be a Rule of Con-"struction in Wills to presume the Testator's "Intention *by Conjecture*, was held to be an "unsound Manner of interpreting such Instru-"ments, the Court adopted the Rule of the "common Law, and took it for granted, that "when the Debtor gave the Creditor an equal "Sum it was intended as a Satisfaction. This "was carried to a remarkable Length in Cran-"mer's Case (*d*), where the Debt was con-"tracted *subsequent to the Will;* for the Master "of the Rolls determined that the *prior Legacy* "discharged it. But that Case gave the *first* "Check to the Doctrine. It was reversed upon "Appeal, upon two Grounds, first, that there "was no Implication of Law that the Legacy "was a Satisfaction; and, secondly, that it

(*d*) 2 Salk. 508.

"was

" was impoſſible to give Evidence of an In-
" tention to ſatisfy Debts contracted ſubſequent
" to the Will. From that Time the Stream
" turned, and has ſince gone in Reſtriction of
" that Idea, ſo much as even to *over-turn*
" the Caſes which went before." Such being the preſent Diſpoſition of the Court towards the Rule, we may extract the following general Heads on this Subject from the ſeveral Caſes which have been decided, *viz.*

If the Legacy be inferior to the Amount of the Debt, it ſhall not be conſidered as a Part Payment or Satisfaction of it (*e*).

And if there be a Difference between the Debt and Legacy *in the Time of Payment*, or if, from any other Circumſtance, *the Proviſion by Will is or may not be ſo beneficial to the Legatee as his Debt or Duty*, the Legacy will not be conſidered as given in Satisfaction of the Debt; (*f*) Atkinſon *v.* Webb, (*g*) Deveze *v.* Pontet, (*h*) Talbott *v.* Shrewſbury, (*i*) Nicholls *v.* Judſon, (*k*) Alleyn *v.* Alleyn, (*l*) Mathews *v.* Mathews, (*m*) Crompton *v.* Sale, (*n*) Clark *v.* Sewell, (*o*) Haynes *v.* Mico, (*p*) Jeacock *v.* Falkener, and (*q*) Richardſon *v.* Elphinſtone.

(*e*) 1 Veſ. 263. Ch. Pre. 394. (*f*) Ch. Pre. 236. (*g*) Ibid. 240, Note. (*h*) Ibid. 394. (*i*) 2 Atk. 300. (*k*) 2 Veſ. 37. (*l*) Ibid. 635. (*m*) 2 P. Will. 553. (*n*) 3 Atk. 96. (*o*) 1 Bro. 129. (*p*) Ibid. 295. (*q*) 2 Veſ. Jun. 463.

If the Debt be contracted by the Teſtator *ſubſequent to the making of his Will*, a Legacy given by it to ſuch Creditor will not amount to a Satisfaction of his Demand, ſo that the Date of the Teſtament is material in this Caſe. (*r*) Cranmer's Caſe, (*s*) Thomas *v.* Bennet, and (*t*) Fowler *v.* Fowler.

If *the Reſidue* of the Teſtator's perſonal Eſtate be bequeathed to his Creditor, ſuch Bequeſt will be no Satisfaction of the Debt, the Court inferring, from the Nature of a Reſidue and the Uncertainty of its Amount, that the Teſtator could not intend ſuch an *indefinite* Bequeſt to go in Satisfaction of a *certain and aſcertained Duty.* And to this Purpoſe are the Caſes of (*u*) Farnham *v.* Philipps, (*v*) Barret *v.* Beckford, and (*x*) Smith *v.* Strong.

The Caſe of *(y)* Rickman *v.* Morgan may appear, on the firſt Impreſſion, to contradict this laſt Propoſition, but, upon Examination, the Fact will be found otherwiſe. In this Caſe a Proviſion was made by Settlement of 8000*l.* a Piece for younger Children, with a Proviſo declaring, *that all ſubſequent Advancements by*

(*r*) 2 Salk. 508. (*s*) 2 P. Will. 343. (*t*) 3 P. Will. 353. (*u*) 2 Atk. 215. (*v*) 1 Veſ. 519. (*x*) 4 Bro. C. C. 493. *(y)* 1 Bro. C. C. 63. 2 Bro. C. C. 394.

the

the Father ſhould be deducted out of the Portions, unleſs otherwiſe declared by him in Writing. The Father afterwards bequeathed 4000*l.* to his Wife for Life, and after her Deceaſe to his third Son, *B;* and he alſo gave to *B* (who was intitled to the Proviſion made under the Settlement) the *Reſidue* of his perſonal Eſtate, which amounted to more than the Portion of 8000*l.* and it was determined that the Bequeſt ſhould go in Satisfaction of *B*'s Portion under the Settlement.

It is obſervable in this Caſe, that the Father had tied himſelf up to certain Terms, in Relation to the Diſpoſition of his Property amongſt his Children, ſubſequent to the Date of his Marriage Settlement; which were, that all future Proviſions he ſhould make for any of them ſhould be deducted out of their Portions provided by the Settlement, *without a written Declaration made by him to the contrary.* The Father having bequeathed to his Son *B* the *Reſidue* of his perſonal Eſtate, without making *any Declaration in writing* that it ſhould *not* go in Satisfaction of his Portion, the Court could not avoid decreeing, upon the Face of the Teſtator's own Deed of Settlement, that ſuch reſiduary Bequeſt ſhould go in Satisfaction of *B*'s Portion under that Inſtrument.—And in doing ſo the Court did not infringe upon any Rule eſtabliſhed upon the Subject by prior Caſes.

The ſame Principle which induced the Court to make ſuch a Rule as before mentioned, in Regard to reſiduary Bequeſts, has alſo induced it to determine, that if there be *a running Account* between the Teſtator and the Legatee, and upon winding up of the Account the Teſtator's Eſtate appear to be indebted to the Legatee, the Legacy ſhall not be conſidered to go in Satisfaction of ſuch *caſual Debt*; (*z*) Rawlins *v.* Powell.

If the Legacy be given *diverſo Intuitu*, as upon Condition to do a particular Thing, in this Caſe the Legacy will not be conſidered in Satisfaction of the Debt owing from him to the Legatee. See the Caſes of (*a*) Matthews *v.* Matthews, and (*b*) Eaſtwood *v.* Vinke.

And it ſeems that where there is *an expreſs Direction* contained in the Teſtament *for Payment of Debts and Legacies*, the Court will infer, from ſuch Circumſtance, that the Teſtator intended both the Debt and Legacy to be paid. Lord King appears to have relied conſiderably upon ſuch Direction in reverſing the Decree of the Maſter of the Rolls, in (*c*) Chancey's Caſe; and in (*d*) Richardſon *v.* Greeſe, Lord

(*z*) 1 P. Will. 297. (*a*) 2 Veſ. 635. (*b*) 2 P. Will. 614. (*c*) 1 P. Will. 408. (*d*) 3 Atk. 65.

Hard-

Hardwicke alluded to the Caſe laſt mentioned, and laid conſiderable Weight upon ſuch Direction in the Caſe then before him.

In Richardſon *v.* Greeſe, laſt referred to, Lord Hardwicke, in delivering his Opinion, ſaid, that Legacies bequeathed to *Servants* had never been held to go in Satisfaction of Debts due to them.

Satisfaction of Portions by Legacies.

It is a general Rule, that where a Parent is under an Obligation, by Settlement, to pay Childrens Portions, and afterwards makes Proviſion for the Children by Teſtament, ſuch ſubſequent Proviſion ſhall be conſidered in Satisfaction or Performance of the Obligation by the Settlement; (*e*) Copely *v.* Copely, (*f*) Moulſon *v.* Moulſon, (*g*) Ackworth *v.* Ackworth, (*h*) Somerſet *v.* Somerſet, (*i*) Finch *v.* Finch, (*k*) Hinchliffe *v.* Hinchliffe, (*l*) and Sparkes *v.* Cator.

(*e*) 1 P. Will. 147. (*f*) 1 Bro. C. C. 82. (*g*) Ibid. 307, Note. (*h*) Ibid. 309, Note. (*i*) 4 Bro. C. C. 38. (*k*) 3 Veſ. Jun. 516. (*l*) Ibid. 530.

We

We have ſeen that in Queſtions upon Satisfaction of Debts by Legacies, if the Legacy bequeathed to the Debtor was leſs than the Debt, or differed from it in the minuteſt Particular, the Legacy would not go in Satisfaction of the Debt. But we muſt obſerve, that the Rule is not ſo ſtrict in Caſes upon Portions, the Inclination of the Court being againſt the raiſing of double Portions. Therefore if the Legacy be of *leſs* Amount than the Portion, or *be payable at a different Time*, yet ſuch Legacy will be adjudged to go in Satisfaction of the Portion *pro tanto;* (*m*) Jeſſon *v.* Jeſſon, (*n*) Thomas *v.* Keymiſh, (*o*) Bruen *v.* Bruen, (*p*) Warren *v.* Warren, and (*q*) Sparkes *v.* Cator.

If, however, the Legacy be *contingent*, and the Portion *abſolute;* or if they be *non ejuſdem Generis;* or if the Legacy be given *with a View to ſome other Purpoſe*, the Legacy will not, in any of thoſe Caſes, go in Satisfaction of the Portion. See the Caſes of (*r*) Bellaſis *v.* Uthwatt, and (*s*) Hanbury *v.* Hanbury.

(*m*) 2 Vern. 255. (*n*) Ibid. 349. (*o*) Ibid. 439. (*p*) 1 Bro. C. C. 305. (*q*) 3 Veſ. Jun. 530. (*r*) 1 Atk. 426. (*s*) 2 Bro. C. C. 352, 529.

Releaſe

Releaſe of Debts by Legacies.

It ſeems, that in all Caſes, in Order to make the Gift of a Legacy an effectual Releaſe of a Debt due from the Legatee, the Intention of the Teſtator to do ſo muſt be *ſtrong* and *manifeſt;* ſo that if it be *probable only* that the Teſtator did not intend to inſiſt upon his Demand; or if it appear that the Teſtator had not ſuch Debt in his Recollection at the Time of making his Will, the Gift of the Legacy will, in neither Caſe, amount to a Releaſe of the Demand. To this Purpoſe is the Caſe of (*t*) Wilmot *v.* Woodhouſe. But in Caſes where the Intention is clear, the Bequeſt will operate as a Releaſe or Extinguiſhment of the Debt. See the Caſe of (*u*) Sibthorp *v.* Moxom.

(*t*) 4 Bro. C. C. 227. (*u*) 1 Veſ. 49.

VESTED

VESTED LEGACIES, AND THE EXECUTORS ASSENT.

Legacies given out of the perſonal Eſtate.

IT is a general Rule of Conſtruction, that when a Legacy is bequeathed to *A to be paid, or payable* at, or when he ſhall attain the Age of 21, or at any other Period, the Legacy will be conſidered to veſt in *Intereſt* in *A immediately*, as a *Debitum in præſenti, ſolvendum in futuro* (*a*), the Time being annexed to the *Payment* only, and not to the Legacy itſelf. And if *A* ſhould happen to die before the Time of Payment, his Aſſignee, or perſonal Repreſentative, will be intitled to receive the Legacy.

There is a Caſe, indeed, which, at firſt Sight, ſeems to oppugn this Rule; but the Caſe is,

(*a*) Swinb. 30. 31. Pre. Ch. 317. 1 Veſ. 217. 2 P. Will. 610. 2 Atk. 184. 3 Atk. 113. Ibid. 426. 3 Bro. C. Ca. 471.

in

in Fact, but an Exception to it, being decided upon the particular penning of the Will. The Caſe was to this Effect (*b*).

A bequeathed the Reſidue of her Eſtate to her two Grand-ſons and Grand-daughter equally; the Shares of her Grand-ſons, with the Intereſt or Accumulations thereof, after a Deduction for their Maintenance and Education, *to be paid to them at* 21; and the Share of her Grand-daughter, with the Intereſt or Accumulation thereof, *to be paid to her* at 21, or Day of Marriage; and directed her Executors *to pay for the Maintenance* and Preferment of her Grand-ſons, *out of the Produce of their Shares of her reſiduary Eſtate*, ſuch Sums of Money as they, her *Executors, ſhould think proper*, and appointed them Guardians of her Grand-children; and ſhe directed, that if her Grand-daughter died under 21, and unmarried, her Share of the Reſidue, with the Intereſt and Accumulations thereof, ſhould be divided between the Teſtatrix's two Grand-ſons; and in Caſe of either of their Deaths, then the Whole to be paid to the Survivor; as alſo the original Share of either of ſuch Grand-ſons happening to die under 21; and that if both of them ſhould

(*b*) Mackell *v.* Winter, 3 Veſ. Jun. Ch. Ca. 236, and 536.

die under 21, and if her Grand-daughter ſhould alſo die under 21, and unmarried, then the whole Reſidue, *with the Accumulations*, was to be paid to *J. B.* Both Grand-ſons having died under 21, the Repreſentative of the Survivor filed his Bill, praying to be declared intitled to two-third Parts of the Reſidue on the Event *of the Grand-daughter's attaining* 21, *or marrying;* the former of which afterwards happened. But the Maſter of the Rolls determined, with Reference to the aforeſaid Rule, that the Repreſentative of the ſurviving Grand-ſon was intitled to Relief, as the Grandſons, in his Opinion, took *veſted Intereſts.* The Chancellor however, on Appeal, reverſed the Decree, holding that from the penning of the Will, and the obvious Intention of the Teſtatrix, the two Grand-ſons took no veſted Intereſts in the Reſidue or Accumulations, and decreed their Shares to the Grand-daughter by Virtue of *a Croſs-remainder implied.*

It ſeems obvious, upon reading this Caſe, that, conſidering the whole Context of the Will, and the Manner of the Bequeſt to the Grand-ſons and Grand-daughter, nothing was intended to be given to them but Maintenance before the Period of *Majority*, or the *Grand-daughter's Marriage.* *That* Maintenance (as is worthy of Notice) is left to the Diſcretion of the Executors, and payable out of the *Produce* of

of the Reſidue, the *Surplus* of which Produce, with the Reſidue, is given over and diſpoſed of upon the Events, and in Manner before mentioned. The *Accumulations*, as well as the Reſidue, being alſo given over upon the Non-arrival of the Grand-ſons at 21, and the Grand-daughter's Death under that Age or unmarried, are ſtrong Circumſtances to ſhew the Teſtatrix's Intention that Nothing was to veſt in the Legatees before the Time of Payment, inaſmuch as the *Produce* of the Fund was not even given to them which accrued in the intermediate Time, but was *ſimply charged with Maintenance.*

It is alſo a Rule of Conſtruction, that when the *Time appointed for Payment* of a Legacy is annexed *to the very Subſtance of the Gift*, the Legacy will not veſt in ſuch Caſes before the Legatee arrive at that Age (*c*). The following Expreſſions have been adjudged to unite the Time of Payment eſſentially with the Bequeſt, *viz.* I bequeath to *A* 100l. *at* or *if*, or *provided* he attain 21.

But we muſt not underſtand that theſe Words are indiſpenſably neceſſary in all Caſes to ſuſ-

(*c*) 2 Salk. 415. Pre. Ch. 317. 3 P. Will. 20. 2 Atk. 41. 3 Atk. 101. 2 Veſ. 264. 1 Bro. Ch. Ca. 123.

pend

pend the veſting of Legacies until the Time limited for their Payment; for in all Caſes where it can be collected that the *Direction for Payment is blended with the very Gift of the Legacy*, the Legacy will not veſt before the Period for Payment of it arrive; as in the following Inſtances.

A bequeathed 900l. to a Truſtee in this Manner (*d*): "after the Death or Marriage of *B* "in Truſt, that *C* ſhould divide the Principal "equally amongſt the Teſtator's three Daugh-"ters at their reſpective Ages of 21, or Mar-"riage."

Lands were deviſed to Truſtees to ſell, with a Direction "that the Money ariſing by the "Sale ſhould be equally diſtributed amongſt "the three Sons and Daughter of the Teſta-"tor's late Niece (*e*)."

A bequeathed the Dividends of Stock to *B*, until he attained the Age of 32, *at which Time* ſhe directed her Executors to transfer the Principal to him (*f*).

(*d*) Scott *v.* Bargeman, 2 P. Will. 69. (*e*) Brograve *v.* Winder, 2 Veſ. Jun. Ch. Ca. 634. (*f*) Batsford *v.* Kebbell, 3 Veſ. Jun. Ch. Ca. 363.

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In all theſe Caſes it was determined that the Legacies did not veſt *in Intereſt* previous to the Arrival of the Time of Payment, that Period being conſidered as of the very Eſſence of the Gift. To the ſame Purpoſe are the Caſes of (*g*) Billingſley *v.* Wills, and (*h*) Liege *v.* Thicknes.

There is a Caſe, however, of very great Authority (being determined on Appeal to the Lords) which ſeems difficult to be reconciled with the Principle of the above Caſes. The Caſe alluded to was in Subſtance as follows (*i*):

The Teſtator gave to Truſtees, who were alſo appointed Executors, the Reſidue of his perſonal Eſtate in Truſt, to ſell, diſpoſe, and improve, to the beſt Advantage, until *A B* ſhould attain the Age of 24; and from his Age of 21, to pay to him, out of ſuch Reſidue, an Annuity of 10l. until 24, and *from thenceforth*, for him, the ſaid *A B*, his Executors, Adminiſtrators, and Aſſigns. Lord King determined that the Legacy veſted in *A B* before the Age of 24, which Decree was confirmed in Parliament.

(*g*) 3 Atk. 219. (*h*) 7 Bro. P. C. 223. (*i*) Love *v.* L'Eſtrange. 3 Bro. Parl. Ca. 337.

When we conſider the Manner in which the Bequeſt of the Reſidue is made to *A B*, the Deciſion in Favour of it veſting in him before the Age of 24, cannot but appear to claſh in Principle with the other Caſes determined on the Subject, inaſmuch as there does not ſeem to have been any Bequeſt made to *A B* of the Reſidue, *diſtinct from the Direction given for its Payment*. There appears ſome Reaſon to infer, from the Arguments made uſe of by the Counſel for the Reſpondents, that the Court muſt have conſidered the Caſe in this Point of View, *viz.* that the Gift of the Reſidue to the Truſtees, coupled with the Truſt declared of it for *A B* at 24, was equivalent to an immediate Gift to him of the Fund, and the Time of Payment only poſtponed to the Period laſt mentioned. In the Caſe of (*k*) Monkhouſe *v.* Home, Lord Loughborough expreſſed his Inability to account for the Principle of this Determination, and thought it probable that it was referable to the Subject-matter of the Bequeſt being *a Reſidue*.

A Diſtinction however muſt be made, even when the Gift of the Legacy, and the Time of Payment are diſtinct, between Caſes where

(*k*) 1 Bro. C. C. 300.

the

the Period fixed for Payment is *certain*, as when the Legatee ſhall *attain* 21; and thoſe Caſes when ſuch Period is *coupled with a Contingency*, as *upon the Marriage, taking holy Orders*, &c. of the Legatee (*l*). In the latter Caſes the Legacy will not veſt before the contingent Event take Place (*m*); and to this Purpoſe are the Caſes of (*n*) Atkins *v.* Hiccocks, and (*o*) Elton *v.* Elton. The Diſtinction is founded upon this Reaſon—In the former Caſes it is inferred, that by poſtponing Payment of the Legacy until the Arrival of the Legatee to the Age of 21, the Teſtator did ſo in Conſideration only of the Legatee's Unfitneſs to manage his Affairs prior to that Period. But in the latter, the Occaſion upon which the Legacy is directed to be paid, is preſumed to have been the *Motive*, and therefore of the Eſſence of the Bequeſt.

In Caſes, however, where there is no Gift of the Legacy prior to the Time appointed for Payment of it, ſo as to veſt the Legacy in Intereſt before that Period, yet if the Teſtator has given the *intermediate Intereſt* to the Legatee, or directed it to be applied for his Benefit, this Circumſtance will have the

(*l*) Swinb. Part 4, Sect. 17, page 267. (*m*) God. Orp. Leg. 452. (*n*) 1 Atk. 500. (*o*) 3 Atk. 504.

Effect to veſt ſuch Legacy; and for this Reaſon, that inaſmuch as *no Intereſt* could accrue to the Legatee previous to the Payment of his Legacy, unleſs *the Principal were due preſently*, the Teſtator's Intention ſhall be preſumed, therefore, to give ſuch Principal at all Events to the Legatee, and to allow him intermediate Intereſt as a Recompence for forbearance of Payment. To this Effect is the Caſe of *(p)* Hoath *v.* Hoath, and the ſeveral other Caſes referred to in the Notes.

But we muſt be careful to diſtinguiſh between Caſes where *Intereſt is given upon Legacies*, and Proviſions are made for Support of the Legatees in ſome other Manner previous to the Payment of their Legacies; as when *a Sum of Money is ſet apart* for the Purpoſe, or *the Produce of another Fund* is directed to be ſo applied; for it is obvious, that the Principle which applies in Favour of the veſting of Legacies, when the intermediate Intereſt is given, does not extend to Caſes of the latter Deſcription; therefore, it has been decided, that ſuch Proviſions will not have the Effect of creating veſted Intereſts in Legacies before the Times

(*p*) 2 Bro. C. C. 3. 1 Vern. 462. 2 Ventr. 342. Pre. Ch. 317. 1 Atk. 512. 3 Atk. 645. 2 Veſ. 263. 2 Bro. C. C. 305.

appointed for Payment of them; (*q*) Atkins *v.* Hiccocks, and (*r*) Pulsford *v.* Hunter.

It is a Rule in the Conſtruction of contingent *executory Bequeſts* of Perſonalty, that the Intereſts of the *firſt* and *ſubſequent* Takers veſt *uno Inſtanti;* therefore, if the ſubſequent Legatee die before the Contingency happens, his Repreſentative will be intitled to the Legacy ſo ſoon as the Event ſhall take place; as if a Bequeſt were made in Favour of *B*, on the Contingency of *A*'s Death, without *leaving* a Child or Children; in this Caſe, although *B* ſhould happen to die in the Lifetime of *A*, yet *B*'s Repreſentative would be intitled to receive the Legacy upon the happening of the Contingency, on the Ground of it being a veſted Intereſt in *B* previous to his Deceaſe. In Support of this Propoſition may be adduced the Caſes of (*s*) Pinbury *v.* Elkin, and (*t*) Barnes *v.* Allen.

But when the Event upon which a Legacy is bequeathed over, is rendered ſo obſcure by the Teſtator's Manner of Expreſſion, as to render that Event *purely conjectural*, as in Caſes

(*q*) 1 Atk. 500. (*r*) 3 Bro. C. C. 416. (*s*) 1 P. Will. 563. (*t*) 1 Bro. C. C. 181.

where the Legacy is given to *B* on the Death of *A*, *before he might have received it*, and the like, the Legacy will be conſidered as an immediate veſted Intereſt in *A*. To this Purpoſe are the Caſes of (*u*) Hutchin *v.* Mannington, and (*w*) Stapleton *v.* Palmer.

Moreover, when Legacies are given at future Periods, which muſt arrive *in the Nature of Remainders*, as in the Caſe of a Bequeſt to *A* for Life of 100l. *and after his Death* then to *B*, the Intereſt of the firſt and ſubſequent Taker will alſo veſt together; and although *B* die in *A*'s Lifetime, yet *B*'s Repreſentative will be intitled to the Legacy; as appears from the Caſes of (*x*) Exel *v.* Wallace, (*y*) Weldon *v.* Fell, (*z*) Danſen *v.* Hawes, (*a*) Monkhouſe *v.* Holme, (*b*) Benyon *v.* Maddiſon, (*c*) Attorney General *v.* Criſpin, (*d*) Scurfield *v.* Howes, and (*e*) Taylor *v.* Langford.

And it ſeems, that notwithſtanding the *Amount and Proportion* of the Shares of the Legatees, or Takers, ſubſequent to the Death of the Perſon taking a Life-Intereſt in the Legacy,

(*u*) 1 Veſ. Jun. C. C. 366. (*w*) 4 Bro. C. C. 490. (*x*) 2 Veſ. 118. (*y*) 2 Atk. 123. (*z*) Ambl. 276. (*a*) 1 Bro. C. C. 298. (*b*) 2 Bro. C. C. 75. (*c*) 1 Bro. C. C. 386. (*d*) 3 Bro. C. C. 90 (*e*) 3 Veſ. Jun. C. C. 119.

be

be ſubject to an Alteration from a Power of Appointment veſted in him or any other Perſon, ſuch Power will not be permitted to prevent the Legacy from veſting in the Legatees or ſubſequent Takers. As ſuppoſing a Legacy to be given amongſt the Children of *B* equally after the Death of *A*, but ſubject to his Appointment, in this Caſe ſuch Power will not ſuſpend the immediate veſting of the Legacy amongſt the Children of *B* in equal Shares, although ſuch Shares will be liable to be diveſted and modified as to the Amount of each Child's Proportion upon the Exerciſe of the Power by *A*; and to this Effect is the Caſe of (*f*) Malim *v.* Barber.

Caſes may occur, however, as Exceptions to the Rule before mentioned, in Regard to the Intereſts of the firſt and ſubſequent Legatees veſting *uno Inſtanti*, upon the particular penning of Bequeſts and the ſpecial Circumſtances which attend them.

(*g*) Thus *A* bequeathed ſeveral Legacies in Truſt for his Children *B*, *C*, and *D* for their Lives, payable to *B* at 21, to *C* at 21, or Marriage, and to *D* upon the Death of *F*; and *A*,

(*f*) 3 Veſ. Jun. Ch. Ca. 150. (*g*) Spencer *v*, Bullock, 2 Veſ. Jun. C. C. 687.

moreover, gave in Truſt for them, and his Daughter *E*, the whole of his reſiduary Eſtate, the Shares of *B C* and *D* being directed to be paid to them at the ſame Time as their Legacies therein before bequeathed; and then he directed, that his Daughter *E*'s Share ſhould be inveſted in his Executors Names *during her Life* for her ſeparate Uſe, *and the Principal for her Child or Children at her Deceaſe equally;* provided that if any of his Children died before their Legacies or Shares in the Reſidue became payable, without Iſſue, the Shares of them ſo dying ſhould go to the Survivors. And he further provided, *that if any of his Children died before his or their Shares became payable, leaving any Child or Children who ſhould happen to ſurvive their Parent*, ſuch Child or Children ſhould be intitled to the Parent's Share *equally*, if more than one; but if one only, then to ſuch Child.

E, the Daughter, had *three* Children living *at the Date of the Will* who ſurvived her, *viz.* *G*, *H*, and *I*; at the Teſtator's Death ſhe had *three* others, and *three* more afterwards. The Queſtion was, at what Period the Legacy or Bequeſt to the Children of *E* veſted, *three* of the latter ſix having died in her Lifetime. And the Maſter of the Rolls was of Opinion, that upon the ſpecial Circumſtances of the Caſe,

Caſe, the Legacy did not veſt in *E*'s Children *previouſly to her Death;* and he particularly obſerved, that ſuch Opinion was chiefly founded upon the Circumſtance of *E*'s having *three Children* living at the Date of the Will; for if the Legacies had veſted in them, and they had happened to die before the Teſtator, *then the Legacies would have lapſed, and become a Part of his perſonal Eſtate undiſpoſed of;* therefore it was declared, that the Adminiſtrator of the *three Children who died in their Mother's Lifetime,* was intitled to no Share in the Reſidue. To the like Purpoſe, and upon a ſimilar Principle, the Caſe of (*h*) Bennett *v.* Seymour, was determined.

When Legacies are charged upon a *mixed Fund,* conſiſting both of real and perſonal Eſtate, if the Legatee die *before* the Time of Payment, the Legacy will ſink into the Land in all Caſes where it would be held to ſink into the Land *if the Fund conſiſted of real Eſtate only;* and will be conſidered as veſted, with Regard to the *perſonal Eſtate,* in all Caſes wherein it would be adjudged ſo if the Fund conſiſted of *perſonal Eſtate alone.* And to this Effect are the Caſes of (*i*) Prowſe *v.* Abingdon,

(*h*) Ambl. 521. (*i*) 1 Atk. 482.

Sherman

(*k*) Sherman *v.* Collins, and (*l*) Jennings *v.* Looks.

Legacies charged upon, and payable out of Lands

We have mentioned before, that Courts of Equity, in their Conſtruction upon the veſting of perſonal Bequeſts, made a Difference when the Words *payable* or *paid* were and were not inſerted in the Manner of giving them; determining in the firſt Caſe in Favour of an *immediate veſting*, and in the latter againſt it; but we muſt notice, that theſe Courts have adopted the above Diſtinction as a mere *poſitive Rule*, in Compliance with the Practice of the eccleſiaſtical Courts, which have a concurrent Juriſdiction with them in theſe Matters, and not from any Conviction of the Rationality of the Rule; they have, on the contrary, generally expreſſed a Diſapprobation of the Diſtinction in thoſe Caſes wherein they have been obliged to decide conſiſtently with it. How-

(*k*) 3 Atk. 318. (*l*) 2 P. Will. 276.

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ever, Legacies charged upon real Eſtate, not being within the eccleſiaſtical Juriſdiction, Courts of Equity have not found themſelves obliged, for Conformity's Sake, to adopt the ſame Rule of Conſtruction in deciding upon thoſe Caſes; they have, therefore, required the whole Condition upon which the Legacies were given to be complied with, *viz.* the Attainment of the Deviſee or Legatee to the Age of 21, and the like, admitting of no Exception when ſuch Legacies are given *payable* at 21, or *at* 21, or *with or without Intereſt*. In Support of this Propoſition may be adduced the Caſes of (*m*) Harriſon *v.* Naylor (*n*), Pearce *v.* Loman, and the ſeveral other Caſes referred to in the Notes.

Although ſuch be the general Rule, Courts of Equity have allowed and eſtabliſhed Exceptions to it in particular Inſtances; as when the Condition annexed to the Legacy has Reſpect to the *Circumſtances of the Eſtate*, and not to the *Perſon* of the Legatee; they conſidering that a Benefit was at all Events intended for the

(*m*) 3 Bro. C. C. 108. (*n*) 3 Veſ. Jun. C. C. 135. 1 Vern. 321. Pre. Ch. 140. 2 P. Will. 600. 612. 1 Atk. 482, 510, 552. 1 1 Bro. C. C. 106. Note.

Legatee,

Legatee, and that the Time of Payment was alone poſtponed with a View to the Conveniency of the Eſtate. Thus, if Lands were deviſed to *A* for Life, with Remainder to *B*, charged with a Legacy to *C* upon the Death of *A*; in this and ſimilar Caſes, although *C* die in *A*'s Lifetime, yet *C*'s Repreſentative would be intitled to the Legacy as it became a veſted Intereſt in *C* upon the Teſtator's Death, the Time of Payment *only* having been poſtponed for the Benefit of *A*. To this Purpoſe are the Caſes of (*n*) King *v.* Withers, (*o*) Hutchins *v.* Foy, (*p*) Cowper *v.* Scott, (*q*) Hodgſon *v.* Rawſon, (*r*) Lowther *v.* Condon, (*s*) Sherman *v.* Collins, (*t*) Tunſtall *v.* Brachen, (*u*) Embrey *v.* Martin, (*v*) Manning *v.* Herbert, (*w*) Eames *v.* Hancock, (*x*) Godwin *v.* Munday, (*y*) Dawſon *v.* Killet, Pawſey *v.* Edgar, Thompſon *v.* Dow, and Morgan *v.* Gardner, cited in the Notes to the Caſe of Godwin *v.* Munday; Jeal *v.* Tickener, Clarke *v.* Roſs, and Kemp *v.* Davey, cited in the Notes to the Caſe of Dawſon *v.* Killet.

(*n*) Forreſt, 117. (*o*) Com. Rep. 716. (*p*) 3 P. Will. 119. (*q*) 1 Veſ. 44. (*r*) 2 Atk. 127. (*s*) 3 Atk. 319. (*t*) Ambl. 167. (*u*) Ibid. 230. (*v*) Ibid. 575. (*w*) 2 Atk. 507. (*x*) 1 Bro. C. C. 119. (*y*) Ibid. 123.

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In determining Caſes according to this Diſtinction, the Court of Chancery appears to have laid a particular Streſs when the Charge of the Legacies upon the Land was not purely *equitable* but *legal*, and would have intitled the Repreſentatives of the Legatee who died before the Time of Payment, to recover the Money in a Court of Law. Thus in the above Caſe of Sherman *v.* Collins, a Right was given to the Legatees, upon Non-payment of their Legacies at the Time appointed, *to enter and hold* until Payment ſhould be made of *Principal and Intereſt*, which was particularly attended to by the Chancellor. A like Right of Entry was provided in the Caſes of Eames *v.* Hancock, and Manning *v.* Herbert; and in Tunſtall *v.* Brachen, Hodgſon *v.* Rawſon, and Embrey *v.* Martin, the Charges operating by Way of *Condition* or *conditional Limitation*, of which the Heir or Deviſee might take Advantage *at Law*: the Court held that the Intereſts which the deceaſed Legatees took in their Legacies, were veſted and tranſmiſſible to their Repreſentatives.

Such appears to be the preſent Law of the Court of Chancery relative to the veſting of Legacies charged upon Lands previous to the Period appointed for their Payment. There are, nevertheleſs, Caſes which ſeem incapable of

of Reconciliation with that Law; as (*a*) Hall *v.* Terry, (*b*) Attorney General *v.* Millner, and the ſeveral Caſes referred to by Lord Thurlow in (*c*) Godwin *v.* Munday.

Aſſent of Executors.

With Reſpect to the Neceſſity of the Executors Aſſent to the Legatee's enjoying the Fruits of his Legacy, ſuch Aſſent is neceſſary to Bequeſts of *perſonal Chattels only* (*d*); and in thoſe Caſes the Legatee cannot lawfully appropriate any Part of the Teſtator's Aſſets in Satisfaction of his Legacy without it; for the legal Intereſt in the whole of the Teſtator's perſonal Eſtate is veſted in the Executor by Operation of Law (*e*), who is in the Nature of a Truſtee in Relation to ſuch Perſons as may have any Claim upon it, and ſo compleat a Title has the Executor to ſuch perſonal Property, that if a Legatee intermeddle with it without his Leave, ſuch Executor may maintain an Action of Treſpaſs or Trover againſt him.

(*a*) 1 Atk. 502. (*b*) 3 Atk. 112. (*c*) 1 Bro. C. C. 194. (*d*) Co. Litt. 111. a. 1 Brown C. 132. (*e*) 2 Atk. 598. Swinb. Part 4, page 235. Dyer, 254. Keilw. 128. 2 Atk. 76.

This Requiſite of the Executor's Aſſent being adopted purely for his Benefit and Safeguard, and being alſo analogous to a Tenant's Attornment to the Grant of a Reverſion, a ſmall Matter will be conſtrued into an Aſſent (*f*); as Expreſſions to the following Effect: "God ſend you Joy of your Bequeſt;" or, "I "intend you to have your Legacy according "to the Deviſe;" alſo permitting the Deviſee of a Term to receive the Rents for a Time only, or applying the Rents for his Maintenance during Minority, when they are directed to be ſo applied by the Will, will have this Effect (*g*).

An Executor may aſſent *before* Probate (*h*); and in Caſes where there are two or more Executors, the Aſſent of any one or more of them is ſufficient (*i*); but Executors cannot aſſent *conditionally* (except the Condition be *precedent* to the Aſſent) nor *ſubject to Revocation*, for in either of thoſe Caſes the Aſſent will be conſidered as good and *abſolute* (*k*). It ſeems alſo, that an Adminiſtrator, *durante minore Ætate* of an Infant, cannot aſſent to a Legacy ſo as *to prejudice* him, being appointed ſolely for the Infant's Benefit (*l*). And as ſuch

(*f*) Touch. 456. Went. Off. Ex. 224. (*g*) Leon, 129. (*h*) Dyer, 367. (*i*) Went. Off. Ex. 223. (*k*) Leon, 129, 130. 4 Co. 28, b. Swinb. Part 1. page 25. (*l*) 5 Co. 29, b.

Ad-

Adminiſtration is to continue during the Infant's Minority, by the Act of the 38th, Geo. III. c. 87, Sect. 6 and 7, it may be inferred, that the Infant cannot legally give his Aſſent before his Arrival at Maturity.

Where a Legacy is limited over to ſeveral by Way of Remainder, or executory Deviſe, the Executor's Aſſent to the firſt Taker will be conſidered as an Aſſent to all the *ſubſequent* Takers or Legatees (*m*). And in general, when a *partial Intereſt* is given to the *Executors*, as for Life, with Limitations over, if the Executors enter *generally*, they ſhall be conſidered as entering *quâ Executors;* and ſuch Entry will not amount to an implied Aſſent to the Bequeſt (*n*). But the ſlighteſt Act of theirs, indicating a different Intention, will convert their Entry into that of Deviſees, and conſequently operate as an Aſſent in Favour of all the ſubſequent Deviſees (*o*).

(*m*) Bro. Abr. Tit. Dev. 235. Sect. 13. 8 Co. 94. (*n*) 10 Co. 47, b, 3 P. Will. 12. Plowd. 520. Cro. Eliz. 223, 347, 348. (*o*) Lev. 25.

LEGA-

LEGACIES CHARGED UPON THE REAL ESTATE.

HEIRS have been always looked upon with Favour by Courts of Juſtice which have eſtabliſhed a general Rule of Conſtruction to their Advantage, *viz.* "that plain Words are required to diſinherit an Heir (*a*);" ſuch therefore being the general Rule, Words equally plain, or indicative of a violent Preſumption of Intention, are neceſſary to create legal Charges upon his Eſtate. *General introductory Words,* however, will have that Effect in Favour of *Creditors* (*b*); but whether the ſame, or ſimilar Words of Preſumption, will have the like Effect in Favour of Legatees, ſeems to be a Queſtion not altogether diveſted of Doubt.

In (*c*) Tompkins *v.* Tompkins, it was determined that the Words, *after Debts and Lega-*

(*a*) 2 Will. 188. (*b*) 1 Vern. 411. 2. Vern. 708. Pre. Ch. 264, 430. Forreſt, 110. 3 P. Will. 91. 2 Veſ. 271, 314. 3 Brown, Ch. Ca. 347. 3 Veſ. Jun. Ch. Ca. 545, 738. (*c*) Pre. Ch. 397.

cies paid, joined with the Manner of bequeathing the Legacies, and the real Eſtate, were ſufficient to charge the former on the latter Fund.

In (*d*) Trott *v.* Vernon, the Words were *Imprimis; I will and deviſe that all my Debts, Legacies, and Funerals, ſhall be paid and ſatisfied in the firſt Place*, and then the Teſtator diſpoſed of his real and perſonal Eſtate. The Deciſion was the ſame in Favour of the Charge.

In (*e*) Alcock *v.* Sparhawk, the Teſtator in the beginning of his Will, deviſed his Lands to his Heir in fee ſimple, and then bequeathed ſeveral pecuniary Legacies, and appointed his Heir Executor, *with a Direction to ſee his Will performed*, and it was adjudged, that ſuch Deviſe and Direction to his Heir amounted to a ſufficient Inference of the Teſtator's Intention to charge the Lands in his Hands with Payment of the Legacies. See alſo the Caſe of (*f*) Lypet *v.* Carter.

In (*g*) Davis *v.* Gardener, the introductory Words were, "*As to my wordly Eſtate*, I diſpoſe of the ſame as follows:—After my Debts *and*

(*d*) Pre. Ch. 430. 2 Vern. 708. S. C. (*e*) 2 Vern. 228. (*f*) 1 Veſ. 499. (*g*) 2 P. Will. 187.

Legacies

Legacies paid, I give, &c." And the Teſtator, after bequeathing ſome Legacies, diſpoſed of his reſiduary perſonal Eſtate thus:—" *After all my Legacies paid*, I give *the reſidue of my perſonal Eſtate* to my Son." And it was determined, upon Inference of the Teſtator's Intention collected from the Circumſtance of his bequeathing a ſuppoſed Reſidue, which it turned out, that he had not, that the Legacies were not by the introductory Expreſſions made effectual Charges upon the Lands.

There is a late Determination which goes the Length of requiring a ſtronger Inference of Intention to charge the real Eſtate with Legacies than with Debts. The Caſe is *(h)* Kightley *v.* Kightley: the introductory Words were, " Firſt I will, and direct that all my legal Debts, *Legacies*, and funeral Expences, ſhall be fully paid and diſcharged, and then the Teſtator bequeathed Legacies, and deviſed his real Eſtate; and it was decreed at the Rolls, that the Legacies were no Charges upon the real Eſtate." The Principle which produced the Decree ſeems to have been this—that the Diſcharge of Debts is a *moral Obligation*, and binding upon the Conſcience of the Teſtator,

(*h*) 2 Veſ. Jun. Ch. Ca. 328.

for which Reaſon Courts of Equity will lay hold of the ſlighteſt Inferences of an Intention to pay them, and effectuate it; but on the contrary, that Legacies being purely *voluntary*, the Reaſon which induced the Court to relax its Rules in Favour of Creditors, does not apply to Legatees; wherefore, expreſs Words, or a manifeſt Intention, muſt appear to create a Charge on Lands for the Benefit of the latter.

There ſeems to be great Weight in the Diſtinction taken by the Maſter of the Rolls in the laſt Caſe; but we muſt obſerve, that the Perſons who made their Decrees in the prior Caſes, never mention or hint at any ſuch Difference as exiſting between Debts and Legacies. It appears, on the contrary, from thoſe Adjudications, that the Intention of Teſtators was the only Thing inquired after, and that very ſlight Grounds of Inference have been conſidered as ſufficient to charge real Property with the Payment of Legacies. In a ſubſequent Caſe of (*i*) Williams *v.* Chitty, Lord Loughborough C. adverted to the Principle laid down by the Maſter of the Rolls in the above Caſe, and ſaid in Reference to Charges on real Eſtate, "that he did not know how to ſtate the

(*i*) 3 Veſ. Jun. Ch. Ca. 551.

Diſ-

Difference" between Debts and Legacies. Upon the Whole, therefore, I think we may conclude, that, although it might not be unreaſonable that a Diſtinction ſhould exiſt between Debts and Legacies in Regard to the Degree of Inference neceſſary to effect Charges upon Lands, yet that the Majority of the Caſes have at preſent fixed the Law againſt the Prevalency of any ſuch.

In Caſes where the real Eſtate is effectually charged with the Payment of Legacies, the Rule is, that the perſonal Eſtate is to be conſidered as the firſt and natural Fund, out of which they are to be paid; and that the real Eſtate is not to be reſorted to, but in Aid only of that Fund. The Court of Chancery has in ſeveral of the Caſes below referred to, laid great Weight upon the Circumſtance of the Deviſee of the Land, being alſo Legatee of the perſonal Eſtate. In Support of theſe Propoſitions may be adduced the Caſes of (*k*) Gower *v.* Mead, (*l*) Dolman *v.* Smith, (*m*) Haſlewood *v.* Pope, (*n*) Bridgman *v.* Dove, (*o*) Lord Inchiquin *v.* O'Brien, (*p*) Samwell *v.* Wake, and (*q*) Ancaſter *v.* Mayer.

(*k*) Pre. Ch. 2. (*l*) Ibid. 456. (*m*) 3 P. Will. 324. (*n*) 3 Atk. 201. (*o*) Ambl. 33. (*p*) 1 Bro. Ch. Ca. 144. (*q*) Ibid. 454.

Teſtator's have, indeed, the Power of depriving the real Eſtate of this Equity or Privilege, by ſhewing their Intention that it ſhould be *primarily* liable to the Payment of Legacies. This Intention, however, muſt appear either by *expreſs Declaration*, or from a *plain and neceſſary Implication;* as where the perſonal Fund is given in the Shape of a *ſpecific Legacy;* (*r*) Heath *v.* Heath, and (*s*) Walker *v.* Jackſon.

Or when the Land is directed to be ſold *out and out*, and the Reſidue of the Money after Payment of Debts and Legacies to be added to the perſonal Eſtate; as in (*t*) Webb *v.* Jones.

But it ſeems that the Caſes have gone further in exempting the perſonal Fund, than in Inſtances purely, where it was given away ſpecifically, and applied the Exemption to Caſes where the perſonal Eſtate was bequeathed as *general Reſidues.* To this Purpoſe are the Caſes of (*u*) Adams *v.* Meyrick, (*w*) Bamfield *v.* Wyndham, (*x*) Wainwright *v.* Bendlowes, (*y*) Bicknel *v.* Page, Anderton *v.* Cook, and

(*r*) 2 P. Will. 366. (*s*) 2 Atk. 624. (*t*) 2 Bro. Ch. Ca. 60. (*u*) Eq. Ca. Ab. 271. (*w*) Pre. Ch. 101. (*x*) 2 Vern. 718. Pre. Ch. 451. S. C. (*y*) 2 Atk. 79.

Kynaſton *v.* Kynaſton, cited in Ancaſter *v.* Mayer (*a*).

The Reaſons upon which the Decrees in the laſt Caſes were founded, ſeem to be neither clear nor intelligible—when the perſonal Eſtate is bequeathed *ſpecifically*, an Intention to exempt it in Favour of the particular Legatee may be reaſonably inferred; but the Intention of exempting ſuch Eſtate collected from the ſimple Fact of diſpoſing of it *generally* as a Reſidue, appears to be an unſound and weak Mode of Conſtruction; of this Opinion was Lord Hardwicke in the Caſe of (*b*) Walker *v.* Jackſon; and alſo Lord Thurlow in that of Ancaſter *v.* Mayer. Upon the Whole, it ſeems, that the Principle of the Caſes determined in Favour of the reſiduary Legatees, is conſidered as unfounded and erroneous, and which would not be adhered to in future Adjudications. Lord Keeper Henley appears to have broken in upon in it the Caſe of (*c*) Stephenſon *v.* Heathcote, which was to this Effect: The Teſtator gave all his real Eſtate to *R* and his Wife for ever, with a Charge thereon for Payment of Debts; and after diſpoſing of other Property, he gave a ſilver Tobacco-box to his

(*a*) 1 Bro. Ch. Ca. 456, 457. (*b*) 2 Atk. 624. (*c*) Cited by Lord Thurlow in Ancaſter *v.* Mayer, 1 Bro Ch. Ca. 466.

Uncle, and all the *Reſidue* he gave to his Wife for ever, whom he appointed ſole Executrix. His Lordſhip decreed, that the perſonal Eſtate was not exempt from Payment of the Debts *in the firſt Inſtance*; and that the Clauſe of giving the ſilver Tobacco-box, and then the Reſidue to his Wife, was not ſufficient to ſhew his Intention to give the *Reſidue free from* Debts.

One eſſential requiſite to create a Charge upon real Property by Will is, that the Execution of the Inſtrument be atteſted by three Witneſſes, purſuant to the Directions of the Statute of Frauds and Perjuries (*d*). If a Teſtator however, create a *general* Charge of Legacies upon his Lands by a Will properly executed and atteſted, and afterwards by a Codicil not duly executed and atteſted to affect real Eſtate, bequeath additional Legacies—upon a Deficiency of perſonal Aſſets, the Legacies by the Codicil will be conſidered as Charges upon the real Eſtate equally with thoſe given by the Will. To this Purpoſe are the Caſes of (*e*) Maſters *v.* Maſters, (*f*) Inchiquin *v.* French, and Hannis *v.* Packer (*g*).

(*d*) 29 Car. 2. c. 3. (*e*) 1 P. Will. 423. (*f*) Ambl. 33, 41. (*g*) Ibid. 556.

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The Principle upon which theſe Caſes were determined, ſeems to have been founded in Analogy to thoſe of Debts (*h*); which, if *generally* charged upon Lands, will include as well thoſe Debts contracted *after*, as thoſe incurred *previouſly* to the Date and Execution of the Will.

If the Charge by Will of Legacies upon Lands be *not general*, but confined to *particular* Bequeſts, although additional Legacies to charge the Land cannot in this Caſe be given by a Codicil not duly atteſted to affect real Intereſts, yet the Legacies given by the Will may be *ſubſtituted, altered*, or *revoked*, by ſuch a Codicil; as appears from the Caſes of (*i*) Brudenel *v.* Boughton, and the (*k*) Attorney General *v.* Ward.

(*h*) 2 Veſ. Jun. Ch. Ca. 236. (*i*) 2 Atk. 268. (*k*) 3 Veſ. Jun. Ch. Ca. 327.

ON THE LIMITATION of CHATTELS.

WITH Regard to *executory Bequeſts* of perſonal Eſtate it appears to have been the early Doctrine of the Court of Chancery, that a Bequeſt for Life of *Chattel-Intereſts* was to be conſidered ſo abſolute a Diſpoſition, as to invalidate any further Limitation over of them after the firſt Legatee's Death *(a)*. The Intention of Teſtators, however, being found to be generally defeated by ſuch a Conſtruction, the old Rule of the Court was relaxed; and the firſt Change of the Law in favour of ſuch Limitations over, was upon Diſtinction taken between the Circumſtance when the *Thing itſelf*, and when *the Uſe only* was given for Life; the Court determining in the latter Caſe, that the Limitation over was good, and in the former that it was invalid *(b)*. In Proceſs of Time, as perſonal Eſtate increaſed in Amount and Eſtimation, and the Liberality

(*a*) 1 Roll. Abr. 610. Bro. Abr. 235, ſ. 13. (*b*) Plow. 521.

of

of Conſtruction was extended, it became no longer neceſſary to reſort to this fine ſpun Diſtinction to give Effect to executory Bequeſts of Chattels. And it is at preſent perfectly ſettled that whether the Bequeſt for Life be *of the Thing itſelf*, or *of the Uſe* purely, a Limitation over upon the Death of the Legatee will be ſupported, and that Chattels may be limited in ſtrict Settlement *by Teſtament* or otherwiſe, ſo as to anſwer all the Purpoſes of an Intail. Care and Skill are indeed neceſſary for the Purpoſe; for if the Bequeſt be limited in ſuch Words as would create *an expreſs Eſtate Tail* in real Eſtate if applied to it, ſuch Words will veſt the abſolute Intereſt of Chattels in the firſt Legatee.

Thus, if perſonal Eſtate be given by Teſtament to *A, and the Heirs of his Body* (*c*). As ſuch Words would create an expreſs Eſtate Tail in Freehold Lands, if applied to them, ſo in *perſonal Eſtate*, if applied to it ſuch Words will have the ſame Effect *to veſt the Intereſt*, as ſuch Property cannot be intailed (*i. e.*) the firſt taker will have the abſolute Intereſt, and the Remainder or Limitation to the Heirs of his Body will

(*c*) 1 P. Will. 290. 2 P. Will. 369. 1 Veſ. 133, 154. 2 Veſ. 646. 6 Bro. Parl. Ca. 255, 395. 5 Bro. Parl. Ca. 435. Term Rep. 596. 1 Bro. C. C. 170. 2 Bro. C. C. 127. 2 Veſ. Jun. C. C. 536.

be

be of none Effect, as alſo will be any other Limitation over expectant upon a failure of ſuch Heirs.

And it makes no Difference in Regard to the Application of the Rule of Conſtruction, whether the *Intereſt* or *Profits only* be given to the ffrſt Taker, and the *Principal* to the *Heirs*, as appears from the Caſes of (*e*) Butterfield *v.* Butterfield, and (*f*) Robinſon *v.* Fitzherbert.

Suppoſe a Legacy to be given in this Manner *viz.* " to *B*, *and if he die without Iſſue*, Remainder to *C*, ſuch a Legacy or Deviſe would be conſidered as *abſolute* in *B*, and the Limitation over void; and for this Reaſon;—*B*, the Legatee or Deviſee, being intitled to Life-Intereſt only, and *C* not intitled to any Thing upon *B*'s *Death*, but expectant upon a *general Failure of B's Iſſue*; if *B* was not conſidered as taking *for himſelf and Iſſue* the Intereſt intermediate between his Death and when *C* could take would be undiſpoſed of; wherefore, as the Words are large enough for the Purpoſe, the Court implies an Intention in the Teſtator to tranſmit the Legacy or Deviſe to *B*'s Iſſue; but as Chattels cannot be intailed, the abſolute Intereſt in them

(*e*) 1 Veſ. 133. 154. (*f*) 2 Bro. Ch. Ca. 127.

muſt

muſt *ex Neceſſitate* veſt in *B.* In ſupport of this Propoſition may be adduced the Caſes referred to in the Notes (*g*).

But in thoſe Caſes, when after the Life-Intereſt of the firſt Taker, the Legacy is given *expreſsly to his Iſſue*, and in Default of them, then to other Perſons, or when the Bequeſt is made to *A* for Life, and after his Deceaſe to *his firſt and other Sons ſucceſſively, and their reſpective Iſſues*, with a Limitation over *in failure of ſuch Iſſues*, as in ſuch Inſtances there is no Neceſſity for reſorting to the Rule of Inference or Implication laſt mentioned; the Court will give Effect to the ſeveral Limitations over (*h*). Upon this Reaſoning (*viz*) that it muſt be decided *at the Death of A*, the firſt Taker, Legatee, or Deviſee, whether he will have any Iſſue or not; and if he leave any, then ſuch Sons or Iſſue will be intitled to the Legacy abſolutely; but if the alternative of the Contingency happen, then the other Limitations depending upon it will take Place according to Priority, ſo that none of them tend to a Perpetuity, for how-

(*g*) 1 Veſ. 9. 2 Veſ. 170. 2 Atk. 308. 3 Atk. 449. Ambl. 398. 478. 1 Bro. Ch. Ca. 187. 1 Veſ. Jun. C. C. 286. (*h*) 1 P. Will. 98. 2 P. Will. 686. Forreſt. 27, 245. 3 Atk. 287. 1 Bro. Ch. Ca. 293. 2 Bro. C. C. 553.

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ever numerous the contingent Limitations may be of Perſonal Eſtate, yet if none of them take Place, the ultimate Limitation ſhall do ſo *(i)*. Lord Talbot, indeed, in the Caſe of *(k)* Clare *v.* Clare, ſeemed to Queſtion the latter Diviſion of this Propoſition (*viz.*) of the Limitation over, taking Place in Default of Iſſue, when the Deviſe or Bequeſt was expreſs to the Iſſue upon the Ground of ſuch Limitation being too remote *after a general failure of Iſſue*; but this Opinion appears to have been clearly over-ruled by the ſeveral Caſes laſt referred to, and upon ſound Principle, for it is obvious that there can be no Danger of a Perpetuity in thoſe Caſes as was apprehended by his Lordſhip, inaſmuch as the Limitation muſt (as has been before obſerved) take Place at all Events within the Compaſs of a Life in Being, or a few Months afterwards, the Limitation over in Default of Iſſue, being a Limitation to take Effect, or not, upon a Contingency *with a double Aſpect*.

If the firſt Legatee or Deviſee for Life (when the ſubſequent Limitation is made to his Iſſue) has a Child born anſwering the Deſcription at any Period during his Life, the abſolute Intereſt in the Deviſe or Bequeſt will immediately veſt in

(i) 3 Veſ. Jun. C. C. 613. *(k)* Forreſt. 21.

ſuch

ſuch Child ſo as to Defeat all contingent Limitations over, unleſs the veſting is ſuſpended by expreſs Proviſion for a further Period of 21 Years, which may be legally done. To this Purpoſe are the Caſes of (*l*) Trafford *v.* Trafford, (*m*) Vaughan *v.* Burſlem, (*n*) Foley *v.* Barnell, and the Duke of Bridgwater *v.* Egerton(*o*).

The Court of Chancery has with a View to effectuate the Intention of Teſtators in all Caſes where Words of Limitation have been improperly applied to perſonal Bequeſts, endeavoured to lay hold of any Expreſſions in the Will, in order to convert ſuch Words into Words of Purchaſe. As in Inſtances when the Bequeſt was made to the *Heirs of the Body* of the Legatee, their *Executors, Adminiſtrators, and Aſſigns*, or equally to be divided amongſt them, and the like. In theſe Caſes, the Court has inferred an Intention from the Words grafted upon the Limitation to the Heirs of the Legatees Body, that the Teſtators could not intend that the Heirs ſhould *inherit quá Heirs in infinitum*, but diſtributively *as Purchaſers*, and therefore it has narrowed the general Import of the prior Words, and effectuated the Limitations over, depending upon a *failure of Heirs of the Body* of the Lega-

(*l*) 3 Atk. 347. (*m*) 3 Bro. C. C. 101. (*n*) 1 Bro. C. C. 274. (*o*) 2 Veſ. 121. in note to 1 Bro. C. C. 280.

tee.

tee. To this Purpoſe are the Caſes of Donne *v.* Merrefield, cited in (*p*) Sabbarton *v.* Sabbarton, (*q*) Jacobs *v.* Amyatt, and the ſeveral other Caſes referred to in the Notes.

For the ſame Reaſon, when from the Nature of the Limitation *to the Heirs of the Body*, the Words if applied toFreehold Lands, would give an *Eſtate Tail only to ſome of the Deviſees, and Eſtates by purchaſe to the Heirs of the Bodies of the reſt of them*, the Court has laid hold of this Circumſtance in perſonal Bequeſts, to infer from it that the Teſtator intended to make *all the Legatees Purchaſers*. Thus, if the Bequeſt were to the following Effect, (*viz.*) to *A* for Life, and after *A*'s Death, to the Heirs of *A*'s Body, and to the Heirs of the Body of *B* and *C*, *and on failure of ſuch Heirs* with a Remainder or Limitation over. Inaſmuch as *the Heirs of the Body* of *B* and *C* in the Caſe ſuppoſed, can only take as *Purchaſers*, under that Deſcription, for Want of a previous Intereſt in their Parents; a ſimilar Conſtruction will be made upon the Limitation to the Heirs of the Body of *A*, ſo that upon the Event of the Death of *A*, *B*, and *C*, without leaving Heirs of their Bodies, the Limitations over will take Place. Upon this Principle,

(*p*) Forreſt. 56. (*q*) 4 Bro. C. C. 542. 2 Atk. 89. 2 Veſ. 652. 1 Veſ. Jun. C. C. 143.

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the Caſe of (*q*) Withers *v.* Algood, was determined.

The Court of Chancery has given Effect to Limitations over of perſonal Property, *after a general Failure of Iſſue of A*, when, from the penning of the Will, an Inference aroſe that the Teſtator intended to confine *A's dying without Iſſue* to a particular Period not too remote; as in thoſe Inſtances where *a perſonal Benefit* appeared to have been intended to the *Legatee over*. If, therefore, a Legacy be given to *A*, *B*, and *C*, *and if any of them die without Iſſue*, his or her Share to go over to the *Survivors* or *Survivor*, the Limitation over would be ſupported, and to this Effect are the Caſes of (*r*) Hughes *v.* Sayer, and (*s*) Nicholls *v.* Skinner.

Upon the like Reaſon of preſumed Intention, if a Legacy was directed to be paid to *A*, within a given and legal Period, *if B died without Iſſue*, ſuch Legacy would be conſidered as valid, inaſmuch as the Event of *B* dying without Iſſue would be confined within the Time fixed for Payment of the Legacy; (*t*) Nichols *v.* Hooper, and (*u*) Chamberlain *v.* Jacob.

(*q*) Cited in the Caſe of Bagſhaw *v.* Spencer, 1 Veſ. 150. (*r*) 1 P. Will. 534. (*s*) Pre. Ch. 528. (*t*) 1 P. Will, 198. and commented upon in 2 Atk. 313. (*u*)) Ambl. 72.

The Words *leaving* or *leave* have been alſo conſidered as ſufficient to reſtrain the general Import of the Word *Iſſue* to thoſe living *at the Death of the firſt Taker*, ſo as to give Effect to the Bequeſts over, upon the Event of there being no ſuch Iſſue in Exiſtence at that Period; therefore, if *A* bequeath a Legacy to *B* upon the Death of *C*, without *leaving* Iſſue, ſuch a Bequeſt will be ſupported, as appears from the Caſes of (*x*) Atkinſon *v.* Hutchinſon, (*y*) Sabberton, *v.* Sabberton, (*z*) Sheppard *v.* Leſſingham. And in Order to give Effect to the Diſpoſitions of Teſtators, the Court has even conſidered thoſe Words as of different Import in the ſame Will, when applied to *real* and *perſonal* Eſtate. In the former Caſe, giving to the Word Iſſue its moſt extenſive Signification, ſo as to create *an Eſtate in Tail* in the Deviſee; but in the latter Caſe, reſtraining the Term to the Incluſion of ſuch Iſſue only as the firſt Legatee ſhould *leave at his Death*. And to this Purpoſe are the Caſes of (*a*) Forth *v.* Chapman, (*b*) and Sheffield *v.* Lord Orrery.

Alſo when *a dying without Iſſue* is preceded by Words of a *narrower Import*, applicable to a

(*x*) 3 P. Will. 258. (*y*) Forreſt. 245. (*z*) Ambl. 122.
(*a*) 1 P. Will. 664 (*b*) 3 Atk. 282.

deſcript

deſcript Claſs of Deſcendants, which muſt take within a certain Period, as in Bequeſts to *A* for Life, and afterwards to his *Children, or Sons,* payable at 21, or Marriage; *and in Default of ſuch Iſſue* with a Limitation over; in ſuch Caſes, the Generality of the latter Words has been governed and controlled by the former; the Court conſidering the Expreſſion in Default of *ſuch* Iſſue to mean *not* a *total* Failure of the Iſſue of *A*, but a Failure only of *ſuch Children or Sons* before deſcribed; (*c*) Maddox *v.* Staines.

The natural Import of the Word *Iſſue* has been alſo reſtrained in Caſes where the Bequeſt to them was coupled with a *Power of Appointment (d)*. Thus *A* deviſed a Term for Years to *B* for Life, and after his Deceaſe to ſuch of *B*'s Iſſue as *B* ſhould by Will appoint; but *if B died without Iſſue,* then he deviſed the Term to *C*; *B* died without leaving Iſſue, and it was determined, that the Limitation over to *C* was good, and it ſeems upon this Ground, *viz.* that the Power of Appointment given to *B* amongſt his Iſſue, ſhewed the Teſtator's Intention in uſing the Term *Iſſue* to mean nothing elſe but *Children.*

(*c*) 2 P. Will. 421. (*d*) Target *v.* Gaunt, 1 P. Will. 432.

ON ELECTION.

THE Doctrine of Election appears to be founded upon this Principle, that a Perſon ſhall not be permitted to claim under any Inſtrument, whether it be a Will or Deed, without giving full Effect to it in every Reſpect, ſo far as ſuch Perſon is concerned therein. Therefore, if a Teſtator undertake to diſpoſe of an Eſtate belonging to *B*, and deviſes to *B* other Lands, or bequeaths to him a conſiderable Legacy by the ſame Will, *B* will not be permitted to keep his own Eſtate, and enjoy at the ſame Time the Fruits of the Deviſe or Bequeſt made in his Favour, but muſt elect whether he will part with his own Eſtate, and accept the Proviſions in the Will, or continue in Poſſeſſion of the former, and reject the latter. See the Caſes of (*a*) Boys *v.* Mordaunt, *(b)* Boughton *v.* Boughton, (*c*) Streatfield *v.* Streatfield, *(d)* Unett *v.* Wilkes, *(e)* Macnamara *v.*

(*a*) 2 Vern. 581. (*b*) 2 Veſ. 12. (*c*) Forreſt. 176. *(d)* Ambl. 430. (*e*) 1 Bro. C. C. 481.

Jones,

Jones, (*f*) Frank *v.* Standiſh, (*g*) Pitt *v.* Jackſon, (*h*) Lewis *v.* King, (*i*) Wardell *v.* Wardell, (*k*) Finch *v.* Finch, (*l*) Whiſtler *v.* Webſter, and (*m*) Wilſon *v.* Mount.

And if a Teſtator deviſe Lands, or Intereſts in Lands to *B*, which are inconſiſtent with the Intereſts or Eſtate which *B* had previouſly therein; as if *B* were Tenant in Tail of a Rent Charge iſſuing out of certain Lands, and the Teſtator deviſed the ſame Premiſes to *B* in ſtrict Settlement, *ſubject to Charges which are incompatible with B's Enjoyment of the Rent-charge*, *B* muſt elect. To this Purpoſe is the Caſe of (*n*) Blake *v.* Bunbury.

But in all Caſes of Election, the Teſtator's Intention to diſpoſe of that which is not his own, ſo as to put the Deviſee or Legatee to an Election, muſt be collected *from the Will*; as in the Caſes of (*o*) Newman *v.* Newman, (*p*) Hoare *v.* Barnes, and the ſeveral other Caſes before referred to, as no Evidence *dehors* the Will, will be admitted to prove that the Teſtator conſidered himſelf poſſeſſed of the Thing deviſed or be-

(*f*) 1 Bro. C. C. 588, Note. (*g*) 2 Bro. C. C. 51. (*h*) Ibid. 600. (*i*) 3 Bro. C. C. 116. (*k*) 4 Bro. C. C. 38, 50. (*l*) 2 Veſ. Jun. 367. (*m*) 3 Veſ. J. 191. (*n*) 1 Veſ. Jun. 514. 4 Bro. C. C. S. C. 21. (*o*) 1 Bro. C. C. 186. (*p*) 3 Bro. C. C. 316.

queathed, in order to oblige the Deviſee or Legatee to make an Election. See the Caſe of (*q*) Stratton *v.* Beſt.

The Teſtator's Intention that the Perſon ſhould elect muſt be alſo clear, for if it be *doubtful*, the Deviſee or Legatee will not be put to his Election;—(*r*) Baugh *v.* Read, (*s*) Read *v.* Croſs, and (*t*) Freke *v.* Barrington.

A *Wife* will be conſidered as a *feme ſole* for the Purpoſe of making an Election; but the Court of Chancery may in its Diſcretion refer it to a Maſter, to enquire whether it would be for her Benefit or not to take under the Will, and give up her other Rights; (*u*) Wilſon *v.* Lord Townſhend.

A *reſiduary Legatee* cannot oblige any Legatee to elect under the Will, and for the following Reaſon, *viz.* becauſe he has no Title to receive any Part of his Teſtator's Eſtate until all Debts *and Legacies* are paid. See the Caſe of (*x*) Cavan *v.* Pulteney.

With Reſpect to the Cuſtom of London,

(*q*) 1 Veſ. Jun. 285. (*r*) 1 Veſ. Jun. 257. (*s*) 1 Bro. C. C. 492. (*t*) 3 Bro. C. C. 274. (*u*) 2 Veſ. Jun. 693. Ibid 560. (*x*) 3 Veſ. Jun. 384.

Queſtions

Queſtions relating to Elections between cuſtomary Shares and Legacies given to Widows and Children, cannot ariſe, except where Freemen neglect to diſpoſe of their Property, or enter into an Agreement that ſuch Property ſhall be liable to the Cuſtom, as the Statute of the 11 Geo. II. (*y*) gives full Power to Freemen to diſpoſe of their perſonal Eſtate by Will, except when Stipulations to the contrary have been made by them. However, in thoſe excepted Caſes the ſame Rules and Obſervations apply in Regard to Elections between Orphan and Widows Shares and Proviſions by Will, as in the Caſes before and thoſe below referred to (*z*).

When the Widow and Children can take both under the Cuſtom and under the Will, without defeating any of the Proviſions of the latter, the Legatees will be intitled to receive both; but it does not ſeem quite ſettled, whether *an expreſs Declaration* that the Legacies ſhould be paid out of the teſtamentary Share, is not neceſſary to prevent the Legatees being put to an Election. The later and better Opinion, however, ſeems to require ſuch a Declaration; as appears from the Caſes of (*a*) Frederick *v.* Frederick, and (*b*) Car *v.* Car.

(*y*) Cap. 18. (*z*) Forreſt. 130. 3 P. Will. 123. 1 Atk. 404. 2 Atk. 627. (*a*) 1 P. Will. 722. (*b*) 2 Atk. 277.

But the Caſe of (*c*) Babington *v.* Greenwood, is to the contrary.

Legatees cannot be obliged to make their Election until all neceſſary Accounts are taken, and the Amount of what they are intitled to under the Will, is ſettled and aſcertained. To this Purpoſe, ſee the Caſes of (*d*) Hinder *v.* Roſe, (*e*) Newman *v.* Newman, and (*f*) Whiſtler *v.* Webſter. And if the Legatees even make their Election, or receive for any Length of Time the Proviſion under the Will, without a Knowledge of their Rights, and the Circumſtances of the Teſtator, they will not be bound by ſuch an Election or Receipt; which is agreeable to the Rule of the Court of Chancery in Caſes of Dower; (*g*) Puſey *v.* Deſbouvrie, and (*h*) Wake *v.* Wake. But if the Fund be *a free Fund, ab Origine*, and the Value and Amount of it eaſily aſcertained, although a Bill would be proper in the firſt Inſtance to aſcertain the Amount, in Order that the Legatee might proceed to elect, yet if the Legatee, without filing ſuch a Bill, receive for any conſiderable Period the Proviſion under the Will, he will be conſidered as bound

(*c*) 1 P. Will. 530. (*d*) 3 P. Will. 125, in Notis. (*e*) 1 Bro. C. C. 186. (*f*) 2 Veſ. Jun. 367. (*g*) 3 P. Will. 316. (*h*) 1 Veſ. Jun. 335.

by

by ſuch Election, and will not be permitted to elect anew; (*i*) Butricke *v.* Broadhurſt.

With Reſpect to thoſe Claſſes of Caſes which relate to the Election of Widows between Dower and Proviſions under the Wills of their Huſbands, the Court of Chancery has made a Diſtinction between theſe and the uſual Caſes of Election; the Rule as ſettled by modern Deciſions requires, that in Order to deprive the Widow of Dower by Election, it muſt not only be ſhewn that the Teſtator *did not intend* her Dower, but that he *meant to exclude her* from it; (*k*) Strahan *v.* Sutton.

Thus if Lands (ſubject to Dower) were deviſed to be ſold, and a Legacy bequeathed to the Widow, ſhe would not be put to an Election between her Dower and the Legacy, inaſmuch as the former is not inconſiſtent with the Deviſe of the Lands, as the Widow may conſent to accept the Value of her Dower out of the Purchaſe Money. See the Caſe of (*l*) French *v.* Davies.

It alſo ſeems to be the better Opinion that a

(*i*) 1 Veſ. Jun. 171. (*k*) 3 Veſ. Jun. 249. (*l*) 2 Veſ. Jun. 572.

Deviſe

Deviſe to the Widow of an *Annuity or Rent-Charge* out of the *ſame Lands* in which ſhe is intitled to Dower, will not oblige her to elect between it and the Deviſe, unleſs the Claim of Dower would defeat or diſappoint any of the Proviſions of the Will. In ſupport of which Propoſition may be adduced the Caſes of (*m*) Pitt *v.* Snowdon, (*n*) Pearſon *v.* Pearſon, and (*o*) Foſter *v.* Cook. There are, however, contrary Adjudications by great Men, *viz.* by Lord Camden, in the Caſe of (*p*) Villareal *v.* Galway; by Lord Northington, in that of (*q*) Arnold *v.* Kempſtead; by Sir Thomas Sewell, in that of (*r*) Jones *v.* Collier; and by Juſtice Buller, in that of (*s*) Wake *v.* Wake. But notwithſtanding thoſe Caſes laſt referred to, the preſent Law of the Court of Chancery, relating to this Subject appears to be as above ſtated.

(*m*) 1 Bro. C. C. 292, Note. (*n*) 1 Bro. C. C. 292. (*o*) 3 Bro. C. C. 347. (*p*) Ambl. 682. 1 Bro. 292. Note, S. C. (*q*) Ambl. 466. (*r*) Ibid. 730. (*s*) 3 Bro. C. C. 255.

ON RESIDUARY ESTATES.

WHEN a *reſiduary Legatee* is appointed by the Teſtator, he will be intitled in general not only to what remains after Payment of Debts and Legacies, but alſo to whatever may fall into it by any Caſualty after the making of the Will—but if no Diſpoſition be made of the Surplus, the Executor has the *legal* Right to it; but if no Executor be appointed, then the Reſidue is to be diſtributed amongſt the Teſtator's next of Kin, according to the Statute of Diſtributions (*a*); Clennell *v.* Lewthaite (*b*), and the other Caſes referred to in the Notes (*c*).

We muſt obſerve, however, that a *reſiduary Legatee*, in order to be intitled to thoſe Benefits, muſt be a *general reſiduary Legatee*, and not a *partial* one; for if it appear that the Teſtator

(*a*) 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 30. (*b*) 2 Veſ. Jun. 465. (*c*) 1 Veſ. 135, 322. 3 Atk. 300. Ambl. 96.

intended

intended ſuch Legatee to have what remained only *after Payment of Legacies*, he will not, as reſiduary Legatee, be intitled to any Benefit *from Lapſes*; (*d*) Attorney General *v.* Johnſtone.

Courts of Equity have indeed, in many Inſtances interfered, and prevented Executors from deriving any Benefit from this their legal Right *quâ* Executors, when the leaſt Inference could be collected from the Teſtament that the Teſtator did not intend them any Advantage or Emolument from it; but it ſeems queſtionable, whether ſuch Interference (although done with a View of furthering the Intentions of particular Perſons) has not been attended with greater Inconveniency to Society from the Multiplication of Suits and the Uncertainty and Intricacy of the Law upon the Subject, than would have been the Caſe if the plain legal Rule had been allowed to prevail generally and without Exception. Many Caſes have occurred upon this Subject between the Executors and next of Kin, and ſeveral Diſtinctions have been introduced, which ſeem to be as follow.

If there be *one* Executor only, and a *pecuniary* or *ſpecific* Legacy be given to or in Truſt for him, ſuch Executor will be excluded from

(*d*) Ambl. 577.

taking

taking the Surplus, upon the reaſoning that the Gift of *Part of* a Reſidue is inconſiſtent with an Intention to give *the Whole of it;* (*e*) Briſtol *v.* Hungerford, and the other Caſes referred to in the Notes (*f*).

And although Legacies ſhould be given to the *next of Kin* as well as to the *Executor*, yet the former will be preferred; (*g*) Farrington *v.* Knightly, and (*h*) Andrew *v.* Clark.

A Diſtinction appears to have been originally attempted between the Circumſtance of a *Wife* being appointed Executrix and Legatee, and of a *Stranger*, upon the Ground of a preſumed Intention in the Teſtator, from the near Relation in which Huſband and Wife ſtand to each other, to impart to her by his Teſtament more extenſive Benefits than to the latter. In (*i*) Ball *v.* Smith, the Chancellor ſeems to have countenanced this Diſtinction; but it is not certain from that Caſe, as reported, that the Chancellor pronounced his Decree upon the Point alone of the Wife being *Executrix as alſo a Legatee*, for there were other Circumſtances of great Moment which alſo occurred in it, to which

(*e*) Ch. Pre. 81. (*f*) 1 Vern. 473. 2 Atk. 47. 3 P. Will. 43. 3 Atk. 226. Ibid. 300. 4 Veſ. Jun. 76. (*g*) 1 P. Will. 544. (*h*) 2 Veſ. 162. (*i*) 2 Vern. 675.

Lord

Lord Harcourt, in (*k*) Farrington *v.* Knightly, imputed the Decree made in the prior Caſe. But even admitting that the Judgment in Ball *v.* Smith was pronounced upon the reaſoning of the *Wife* being Executrix and Legatee, it ſeems impoſſible to maintain its Authority in Oppoſition to the other Caſes upon the Subject. —See the Caſes of (*l*) Randall *v.* Bookey, (*m*) Ward *v.* Lant, (*n*) Southcot *v.* Watſon, (*o*) Lake *v.* Lake, and (*p*) Martin *v.* Rebow.

Theſe Authorities appear to have ſettled beyond the Limits of Controverſy, that Legacies bequeathed to *femes Executrixes* will exclude them from the Reſidue, as well as Executors who are Strangers, or Perſons related in no Degree to the Teſtators.

Where there are two or more Executors, and *equal* Legacies are given to them, ſuch Legacies will deprive them of the *Reſidue;* (*q*) Petit *v.* Smith, and (*r*) Rogers *v.* Rogers, as rectified in Mr. Cox's Note. But if the Legacies are *not of equal Amount,* whether they be *pecuniary* or *ſpecific,* yet the Executors will be intitled to the Reſidue, as an Inference ariſes, from the Dif-

(*k*) 1 P. Will. 544. (*l*) 2 Vern. 425. (*m*) Ch. Pre. 182. (*n*) 3 Atk. 226. (*o*) Ambl. 126. (*p*) 1 Bro. C. C. 154. (*q*) 1 P. Will. 7. (*r*) 3 P. Will. 193.

ference in Value, that the Teſtator intended only to prefer one of the Executors to the other, and not to exclude them from their legal Right to the Surplus; for upon a Deficiency of Aſſets ſuch *unequal* Bequeſts may have a very *pointed* and *ſingular* Effect; (*s*) Braſbridge *v.* Woodroffe, (*t*) Blinkhorn *v.* Feaſt, and (*u*) Bowker *v.* Hunter.

Upon a like Inference of Intention, if Legacies be given to *ſome* of the Executors *only*, ſuch Legacies will not exclude them from the Reſidue; (*x*) Oliver *v.* Frewen.

We muſt take Notice, however, that a Diſtinction has been attempted between *pecuniary* and *ſpecific* Bequeſts to Executors, in Regard to excluding them from the Reſidue, *viz.* that although the former will effect a Bar, yet the latter will not do ſo, upon the Principle of an Intention preſumed in the Teſtator to diſtribute *ſpecific Parts* of his Eſtate amongſt his Executors in different Proportions, and not with a View to exclude them from the Reſidue. But this Diſtinction has never been taken by any decided Authority; on the contrary, the Caſes deter-

(*s*) 2 Atk. 690. (*t*) 2 Veſ. 27. (*u*) 1 Bro. C. C. 328. (*x*) 1 Bro. C. C. 590.

mined

mined upon the Subject negative it. The Caſe of (*y*) Blinkhorn *v.* Feaſt was decided in Favour of the Executors, not becauſe the Legacies were *ſpecific*, but *unequal*. In (*z*) Southcot *v.* Watſon, Lord Hardwicke denied the Diſtinction, as alſo did Mr. Juſtice Buller in the Caſe of (*a*) Nourſe *v.* Finch. The Caſes of (*b*) Randall *v.* Bookey, (*c*) Martin *v.* Rebow, and (*d*) Holford *v.* Wood, are alſo Authorities againſt any ſuch Diſtinction.

It ſeems that if Legacies were given to *two or more Executors* only, and no Legacies bequeathed to the others of them, the Legacies ſo given would not exclude the Executors from the Reſidue. See the Caſes of (*e*) Coleſworth *v.* Branguin, (*f*) Buffar *v.* Bradford, and Johnſon *v.* Twiſt, cited in the Caſe of (*g*) Wilſon *v.* Ivat.

But if it be apparent, from the Terms of the Bequeſt, that Legacies ſo given to one or more Executors in Excluſion of the Remainder of them, were intended in full for what they ſhould receive of the Teſtator's Eſtate beneficially, *quâ* Executors; in ſuch Caſes, thoſe

(*y*) 2 Veſ. 27. (*z*) 3 Atk. 226. (*a*) 1 Veſ. Jun. 344. (*b*) 2 Vern. 425. (*c*) 1 Bro. C. C. 154. (*d*) 4 Veſ. Jun. 76. (*e*) Ch. Pre. 323. (*f*) 2 Atk. 221. (*g*) 2 Veſ. 166.

partial

partial Bequeſts will exclude the Executors from taking the Reſidue—as in Inſtances when a Legacy is given to *one* of two Executors, *for his Care in ſeeing the Will executed;* (*i*) White *v.* Evans.

When Legacies are given in ſuch a Manner as to raiſe no Inference, that the Teſtator's Intention in giving them was ſuch as to be inconſiſtent with the general Rule of Law in Favour of the Executor's taking the Surplus, ſuch Legacies will not be permitted to defeat them of it; and this is the Caſe when the Legacies bequeathed to the Executors are *by Way of Exception* out of other Legacies; as if the Bequeſt was of the Uſe of Plate to the Executor for Life, and afterwards to *B;* the Legacy to the Executor would be conſidered as an *Exception* only out of that bequeathed to *B,* and would not deprive the Executor of the Reſidue; (*k*) Griffith *v.* Rogers, (*l*) Jones *v.* Weſtcomb, (*m*) Hoſkins *v.* Hoſkins, (*n*) Granville *v.* Ducheſs of Beaufort, (*o*) Newſtead *v.* Johnſon, (*p*) Lawſon *v.* Lawſon. See alſo Lord Hardwicke's Obſervations in the Caſe of (*q*) Southcot *v.* Watſon.

(*i*) 4 Veſ. Jun. 21. (*k*) Ch. Pre. 231. (*l*) Ibid. 316 (*m*) Ibid 263. (*n*) 1 P. Will. 114. 1 Bro. P. C. 305. S. C. (*o*) 2 Atk. 45. (*p*) 7 Bro. P. C. 511. (*q*) 3 Atk. 226.

In other Caſes, when a neceſſary Implication or violent Preſumption appears upon the Face of the Will, that the Teſtator intended his Executors to be *Executors in Truſt* only, and by naming them Executors to give them no beneficial Intereſt in his perſonal Eſtate, ſuch Executors will be excluded from the Reſidue—

As where the Executors are expreſsly called by the Teſtator, *Executors* in Truſt; (*r*) Pring *v.* Pring, (*s*) Bagwell *v.* Dry, and (*t*) Graydon *v.* Hicks——

Or where the *Reſidue* is bequeathed to them as *Truſtees*, upon various Truſts for the Benefit of others, which Truſts afterwards fail; (*u*) Read *v.* Snell——

Or when the Legacies given to the Executors are expreſſed to be in Conſideration of their *Care and Pains, or Trouble and Expences* in executing the Truſts of the Will; (*x*) Rachfield *v.* Careleſs, and May *v.* Lewin, cited in that Caſe; (*y*) Dean *v.* Dalton——

Or when the Surplus is *originally effectually* given away from the Executors, but the Whole,

(*r*) 2 Vern. 99. (*s*) 1 P. Will. 700. (*t*) 2 Atk. 18. (*u*) 2 Atk. 645. (*x*) 2 P. Will. 158. (*y*) 2 Bro. C. C. 634.

or

or ſome Part of it, becomes undiſpoſed of by ſubſequent Events; (z) Androvin *v.* Poilblanc, and (a) Bennet *v.* Batchelor——

Or when the Reſidue is *defectively* diſpoſed of; as that is ſufficient to ſhew that the Teſtator did not intend his Executors any beneficial Intereſt in his reſiduary Eſtate; (b) Davers *v.* Dewes, (c) Biſhop of Cloyne *v.* Young, and (d) Mordaunt *v.* Huſſey.

In Caſes where the Reſidue is given to the Executors by expreſs Bequeſt *as Tenants in Common*, and one or more Shares become lapſed by the Death of one or ſome of them, ſuch Share or Shares will belong to the Teſtator's next of Kin, in Preference to the *ſurviving* Executors, and for this Reaſon, *viz.* that the Teſtator by giving to his Executors his reſiduary Eſtate, in *divided Shares*, is preſumed to have intended to give them by Implication no more than the *Amount* of ſuch Shares. See the Caſes of (e) Man *v.* Man, (f) Page *v.* Page, (g) Owen *v.* Owen, and (h) Peat *v.* Chapman. But when the Reſidue is bequeathed to them in Joint-Tenancy, the Shares of thoſe dying will not be

(z) 3 Atk. 299. (a) 3 Bro. C.C. 28, (b) 3 P. Will. 40. (c) 2 Veſ. 91. (d) 4 Veſ. Jun. 118. (e) 2 Stra. 905. (f) 2 P. Will. 489. (g) 1 Atk. 494. (h) 1 Veſ. 542.

diſtributable amongſt the Teſtator's next of Kin, but will go over to the ſurviving Executors; (*i*) Frewen *v.* Relfe.

Parol Evidence.

It has been before obſerved, that Courts of Juſtice are very jealous in the Admiſſion of parol Evidence to create or diſappoint Intereſts; another Inſtance, however, in which they have admitted ſuch Evidence, is for the Purpoſe of rebutting a Truſt of the Reſidue reſulting to the next of Kin, when Legacies are given to the Executors; (*k*) Fane *v.* Fane, (*l*) Granvill *v.* Ducheſs of Beaufort, (*m*) Wingfield *v.* Atkinſon, (*n*) Batchellor *v.* Searle, (*o*) Heron *v.* Newton, (*p*) Petit *v.* Smith, (*q*) Rutland *v.* Rutland, (*r*) Braſbridge *v.* Woodroffe, (*s*) Lake *v.* Lake, (*t*) Littlebury *v.* Buckley, and (*u*) Clennel *v.* Lewthwaite. And as parol Evidence was allowed to be given on

(*i*) 2 Bro. C. C. 220. (*k*) 1 Vern. 30. (*l*) 2 Vern. 648. (*m*) Ibid. 673. (*n*) Ibid. 736. (*o*) 9 Mod. 11. (*p*) 1 P. Will. 9. (*q*) 2 P. Will. 210. (*r*) 2 Atk. 69. (*s*) Amb. 126. (*t*) 1 Bro. P. C. 340. (*u*) 2 Veſ. Jun. 465.

Behalf

Behalf of the Executors, Juſtice required that ſimilar Evidence ſhould be admitted in Favour of the next of Kin; (*x*) Rachfield *v.* Careleſs.

Notwithſtanding the above Caſes, by which the Law for admitting parol Evidence is unqueſtionably ſettled, ſucceſſive learned Men have regretted that the Rule was ever ſo eſtabliſhed. In the Caſe of (*y*) Blinkhorn *v.* Feaſt, Lord Hardwick expreſſed a Doubt as to the Propriety of admitting ſuch parol Evidence, but that Doubt ſeems to have been removed previous to his Lordſhip's Deciſion, in the Caſe of (*z*) Lake *v.* Lake; Mr. Juſtice Buller admitted the Rule to be as above ſtated in the Caſe of (*a*) Nourſe *v.* Finch, but lamented that it was ſo eſtabliſhed, and was of Opinion that ſuch Rule became gradually ſettled *upon a Miſconception of the earlier Caſes.*

When Legacies are given to Executors, as from this Circumſtance a Truſt of the Reſidue ariſes by *Implication* for the next of Kin, the *Onus* of proving a different Intention in the Teſtator lies upon the Executor. The Evidence, in Order to be ſufficient to repel the Preſumption in Favour of the next of Kin, muſt be

(*x*) 2 P. Will. 158. (*y*) 2 Veſ. 27. (*z*) Ambl. 126. (*a*) 1 Veſ. Jun. 344.

plain and indiſputable—*vague parol Declarations* made by the Teſtator at different Periods of his Life will have no Weight, but thoſe only are material *which paſſed at the Time of making the Will* (*b*); and it appears more reaſonable to ſuppoſe that the Declarations of a Teſtator at that Time, are intended by him to carry with them the more certain and fixed Purpoſes of his Intention to exclude his Relations, than any *haſty Expreſſions* uttered by him during the other Periods of his Life; for the latter Declarations might be produced from the Heat of momentary Paſſion, or from the Impulſe of ſhort Diſguſt. I muſt obſerve, however, that there is a Caſe determined at the Rolls (*c*), Clennell *v.* Lewthwaite, in which Declarations made by the Teſtator ſubſequent to his Will were conſidered as good Evidence, and produced a Decree in Favour of the Executor, who was alſo a Legatee.

(*b*) 2 P. Will. 210, 215. 1 Veſ. Jun. 344, 359. (*c*) 2 Veſ. Jun. 465, 475.

JU-

JURISDICTION OF COURTS IN LEGATORY MATTERS.

THE Courts which at preſent have Juriſdiction in teſtamentary Matters are the Court of Chancery, the Spiritual or Eccleſiaſtical Courts, and ſome Courts Baron. The two laſt Deſcriptions of Courts have excluſive Juriſdiction in the Probate of Wills, and the Courts Baron have their Juriſdiction of the Subject founded upon *immemorial Uſage* (*d*). The Probate of Teſtaments, and, of Conſequence, the Determination of Matters ariſing out of them, belonged originally to the County-Court, in which the Sheriff and Biſhop ſat together prior to the Conqueſt (*e*). Whilſt theſe two Judges preſided, no Diſtinction was made in the Determination of lay and eccleſiaſtical Cauſes, any further than as each of thoſe Judges might think proper to pay greater Reſpect and Deference to the Opinion of the other in Queſtions more particularly within their ſeveral Provinces. After the Acceſſion of William the Firſt, and the conſequent Diſmemberment of the County-Court, ariſing from the Biſhop being prohibited to ſit any longer in Judgment with the Sheriff, the Conſideration of lay and eccleſiaſtical Queſtions naturally fol-

(*d*) Off. of Executors, 43. (*e*) Lamb. Sax. Laws, P. 64.

lowed their reſpective Judges.—But it cannot now be ſatisfactorily aſcertained at what particular Period after this Alteration in the Buſineſs of the County-Court, the Eccleſiaſtical or Biſhop's Court firſt acquired a Juriſdiction in teſtamentary Matters; it is agreed, however, to have exiſted ſo early as the Reigns of Henry I. or Henry II. but not in Excluſion of the Courts of common Law (*f*).

Although the Eccleſiaſtical Courts have, through Length of Time, acquired the original Juriſdiction in *Rebus Teſtamentariis*, Courts of Equity have nevertheleſs obtained a concurrent Juriſdiction with them in Determinations upon perſonal Bequeſts, as Relief in thoſe Caſes is generally dependant upon a Diſcovery and Account of Aſſets (*g*). And an Executor being conſidered a Truſtee for the ſeveral Legatees named in the Teſtament, the Execution of Truſts is never refuſed by Courts of Equity (*h*). Theſe Courts, indeed, in ſome other Inſtances which frequently occur upon the preſent Subject, exerciſe a Juriſdiction in Excluſion of the Eccleſiaſtical, inaſmuch as the Relief given by the former is more efficient than that adminiſtered by the latter. One of thoſe Caſes happen when a Huſband endeavours to obtain Pay-

(*f*) Spelm. Origin of the Probate of Wills, 128. Glanv. Lib. 7, c. 6 and 7. (*g*) 3 Bla. Com. 98. (*h*) 1 P. Will. 544. Ibid. 575.

ment

ment of his Wife's Legacy; Equity will oblige him to make a proper Settlement upon her before a Decree will be made for Payment of the Money to him—but this the Eccleſiaſtical Court cannot do; therefore if the Baron libel in that Court for his Wife's Legacy, the Court of Chancery will grant an Injunction to ſtay Proceedings in it (*i*). Another of thoſe Inſtances occurs when Legacies are bequeathed to Infants; for Equity will protect their Intereſts, and give proper Directions for ſecuring and improving the Fund for their Benefit, which cannot be effected in the Eccleſiaſtical Court (*k*).

It has been before obſerved, that the Probate of Wills belongs excluſively to the Eccleſiaſtical Courts, except in the Inſtance above adduced; from whence it follows, that if a Probate has been obtained by Fraud, the Eccleſiaſtical Court can alone revoke it (*l*). But a Court of Equity will interfere and prevent a Perſon taking an undue Advantage by conteſting the Validity of a Probate, when ſuch Perſon *has acted under it*, and *admitted Facts* material to its Validity (*m*). In like Manner the Court will interpoſe when a Probate, has been obtained by Fraud, and either convert the Wrong-doer into *a Truſtee* in Reſpect of ſuch

(*i*) 1 Atk. 491. 1 Atk. 516. 2 Atk. 420. Ch. Pre. 548.
(*k*) 1 Vern. 26. (*l*) 1 P. Will. 388. (*m*) 1 Atk. 628.

Probate,

Probate, or elſe will compel him to conſent to a Revocation of it in the Eccleſiaſtical Court; (*n*) Barneſly *v.* Powel.

We muſt take Notice, that the Juriſdiction of the Eccleſiaſtical Courts is confined to Teſtaments purely, or in other Words to Bequeſts of perſonal Eſtate; therefore, if Lands are the Subject of a Deviſe to ſell for Payment of Debts, thoſe Courts cannot hold Plea in Relation to them, but Courts of Equity only (*o*).

The Eccleſiaſtical Courts, however, have Juriſdiction in Queſtions ariſing out of Intereſts in Lands, as in Deviſes of Terms for Years, or of Rents payable out of them; for ſuch Deviſes relate to *Chattels real* only (*p*).

But if a Legatee alter the Nature of his Demand, and change it into a Debt or Duty, as by accepting a Bond from the Executor for Payment of the Legacy, it ſeems that ſuch Circumſtance will either deprive the Eccleſiaſtical Court of its Juriſdiction, or elſe give an Option to the Perſon intitled, to ſue in

(*n*) 1 Veſ. 120, 284. (*o*) Dyer, 151. Palm. 120. 2 Show. 50. pl. 36. (*p*) Cro. Jac. 279. Bulſ. 153. 2 Keb. 8.

that,

that, or a temporal Court, at his Diſcretion (*q*).

In thoſe Caſes where the Eccleſiaſtical Courts have undoubted Juriſdiction, yet if a *temporal Matter* be pleaded in Bar of the Relief ſought, they muſt proceed according to the Rules of the common Law, or elſe they will be prohibited from proceeding—thus, if *Payment* were pleaded in Bar to a Legacy, and there was but *one* Witneſs whom the Eccleſiaſtical Court would not admit, becauſe their Law requires *two*, a Prohibition would be granted by the temporal Courts upon Application, for the Reaſon laſt aſſigned (*r*).

Caſes have occurred in which Courts of common Law have taken Cognizance of teſtamentary Matters, and permitted an Action to be inſtituted for Payment of Legacies when Proof was made of an *Aſſumpſit* or undertaking by the Executor to pay them (*s*); but the Principle of thoſe Caſes appears to be ſhaken by a late Deciſion of the Court of King's Bench, in the Caſe of (*t*) Deekes *v.* Strutt, diſaffirming that Court's Juriſdiction in thoſe Matters,

(*q*) Yelv. 39. 2 Roll. Rep. 160. (*r*) 3 Bac. Abr. Tit. (Leg.) Page 489. (*s*) Sid. 45. Raym. 23. 2 Lev. 3. Ventr. 120. 11 Mod. 91. pl. 15. (*t*) 5 Term. Rep. 690.

upon the Ground that a Court of common Law was, *from its Rules*, incompetent to adminiſter that *complete Juſtice* to the Parties which Courts of Equity had the Power, and was in the conſtant Habit of doing.

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Printed by G. WOODFALL, No. 22, Paternoſter-Row, London.

ERRATA.

Page 15. The Reference *(o)* in the Notes is placed laſt inſtead of firſt.

49. Line 18. For "Burrougs" read *Burroughs*.

50. 3. In Notes—For "At" read *Atk*.

61. 4. Place the ſemi-colon *after* the Reference *(e)*; and in Line

19. Expunge *of*.

66. 25. For "the" after (*viz.*) read *by*.

82. 7. For "Malcom" read *Malcolm*.

112. 26. For "com" read *come*.

158. 16. For "Teſtator's" read *Teſtators*.

18. Inſert *if* after the words "diſpoſed of."

190. 2. In Notes, inſert the Letter *C* after "1 Brown C."

202. 12. Inſert *a* after the word "upon."

204. 15. Inſert *a* after the words "intitled to."